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No. 87-1341

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

BROWN COMPANY;
BROWN COMPANY, LIVINGSTON-GRAHAM DIVISION;
BROWN COMPANY, TRI-CITY CONCRETE DIVISION;
AND L-T TRANSPORT, INC.,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STUART H. YOUNG, JR.
HILL, FARRER & BURRILL
445 South Figueroa Street
34th Floor, Union Bank Square
Los Angeles, California 90071-1666
(213) 621-0460
Attorneys for Petitioners

Publishing and Graphic Electronic Services, Inc. (PAGES) / (213) 474-7855

QUESTION PRESENTED[1]

Whether the National Labor Relations Board and Court of Appeals improperly overruled an interpretation of contract language, made pursuant to the bargaining parties' agreed-upon method for resolving contractual disputes, and substituted their own judgment of the contract's meaning, contrary to the authority of this court and general principles of federal labor law.

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[1] The caption of this case shows all parties to the proceeding in the court whose judgment is sought to be reviewed, other than Kris A. Borum, an individual, who intervened in those proceedings.

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NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Ninth Circuit, entered on November 6, 1987.

CITATIONS TO OPINIONS BELOW

The original Decision and Order of the National Labor Relations Board ("NLRB"), reported at 243 NLRB 769 (1979) is contained, *infra*, in Appendix A. The original unpublished Memorandum opinion of the Ninth Circuit Court of Appeals, together with the separate dissenting Memorandum, in Cases No. 79-7380 and 79-7475 (1981) is contained, *infra*, in Appendix B. The NLRB's Supplemental Decision and Order following remand and reported at 278 NLRB

No. 113 (1986) is contained, *infra*, in Appendix C. The Ninth Circuit's Order in Cases No. 86-7579 and 86-7647, 833 F.2d 1015 (Nov. 6, 1987) is contained, *infra*, at Appendix D.

JURISDICTION

The Order of the United States Court of Appeals for the Ninth Circuit was entered on November 6, 1987 (Appendix D). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 29 U.S.C. § 160(e).

STATUTES INVOLVED

The United States statutes involved are as follows:

(1) § 203(d) of The Labor Management Relations Act of 1947, 61 Stat. 153, 29 U.S.C. § 173(d):

> "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service [Federal Mediation and Conciliation Service] is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases."

(2) § 8(a)(5) of The National Labor Relations Act, 49 Stat. 452, (29 U.S.C. § 158(a)(5)):

> "(a) It shall be an unfair labor practice for an employer —
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

(3) § 10(a) of The National Labor Relations Act, 49 Stat. 453, (29 U.S.C. § 160(a)):

> "(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

STATEMENT OF CASE

The Petitioners herein ("Brown") were parties to a multi-employer collective bargaining agreement (commonly referred to as the "Blue Book") with, among other Teamster locals, the Building Material & Dump Truck Drivers Local 420, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Teamsters Local 420"). Along with numerous other classifications, the "Blue Book" covered a classification of employees known as cement

train drivers.[1] In 1975, Brown employed some 200 employees under the terms of the "Blue Book," of which only 12 were cement train drivers.

The "Blue Book" contained a binding grievance procedure for the resolution of disputes arising under the "Blue Book":

Article XI, Section 1(b):

> " . . . [A grievance] shall be presented in writing through the Union to the Employer's Negotiating Committee. . . . A committee of an equal number of representatives of the Employer's Negotiating Committee and the Union will meet . . . to settle the grievance. This Committee is authorized to adopt rules of procedure by mutual agreement and such rules of procedure shall be binding upon all signatories to this Agreement. If a decision is reached by this Committee, it *shall be final and binding upon all parties involved.*" [Emphasis supplied]

This "Blue Book" grievance procedure imposed no limits upon the authority of the Committee, other than the power to "settle the grievance." In addition to this discreet settlement procedure, the "Blue Book" also empowered this Committee to interpret or apply the terms of the "Blue Book" from time to time:

> Article XIII
>
> BARGAINING
>
> "Section 1. Interpretation of the Agreement.

---

[1] A cement train consists of a tractor and two trailers used for hauling cement, an ingredient in concrete.

> Questions concerning interpretation or application of this Agreement may arise from time to time and in the interest of preventing misunderstandings, an equal number but not less than three (3) each from the Employer's Negotiating Committee and the Union Negotiating Committee shall promptly meet at the request of either in an attempt to resolve such question, but in any event within thirty (30) days, unless otherwise mutually extended."

By 1976, an industry practice had developed whereby less than 2% of all cement trains in the Southern California area were operated under the terms of the "Blue Book." Rather, Brown's competitors, with the Union's blessings, created or acquired companies to which they transferred ownership of the cement trains. The related companies then employed cement train drivers pursuant to a collective bargaining agreement known as a "for-hire" agreement to operate the trains. The terms of the "for-hire" agreement were more favorable than the "Blue Book" and, therefore, this industry practice put Brown at a competitive disadvantage. In an effort to ameliorate this competitive disadvantage, Brown insisted that Teamsters Local 420 enter into a similar "for-hire" agreement with respect to Brown's cement train drivers. Teamsters Local 420 agreed to enter into a "for-hire" agreement with Brown provided that its cement train driver-members consented. The issue of executing a "for-hire" agreement and thus removing the cement trains from the coverage of the "*Blue Book*" became a bit of a cause celebre and numerous meetings were held on the subject involving the Union and the drivers and, sometimes, the company. At all times, Teamsters Local

420 expressed its interpretation of the "Blue Book" as giving the drivers only two choices: Consent to a "for-hire" agreement, or lose the cement train jobs. Thus, Teamsters Local 420 repeatedly advised its members that if they refused to consent, Brown was contractually entitled to transfer the cement trains outside the geographical jurisdiction of the "Blue Book." For example, Union officials frequently urged and entreated the cement train drivers to consent to Teamsters Local 420 entering into a "for-hire" agreement with Brown on the grounds "that there was *nothing that could be done* about the movement of cement trains to another location or another company." [Emphasis supplied] (Tr. 463)[2] Similarly, Teamsters Local 420's chief representative informed the cement train drivers that if a "for-hire" agreement was not reached, Brown could move "the cement trains out of this plant, out of our jurisdiction, under another agreement — or nonunion, whichever they chose to do [and] the people involved would not be able to go with it and they'd have to bump [into other jobs under the 'Blue Book'] in compliance with our . . . Blue Book seniority and bumping procedure." (Tr. 481). The bottom line is that Teamsters Local 420 "didn't see any way [it] could keep the company from doing what they wanted to do with their equipment." (Tr. 574) At *no* time did Teamster Local 420 ever hold out any hope that Brown was contractually compelled to continue operating the

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[2] The citation "Tr." refers to the official transcript of the hearing before the Administrative Law Judge of the National Labor Relations Board, whose decision is contained in Appendix A.

cement trains under the "Blue Book" if the drivers withheld consent to a "for-hire" agreement.

Notwithstanding Teamster Local 420's entreaties, the drivers refused to consent. In concert with the Union's view of its contractual rights, Brown transferred the cement trains out of Teamsters Local 420's jurisdiction in January 1976 and entered into a "for-hire" agreement with other Teamster affiliated locals (Local 467 and 871). Nine out of the twelve cement train drivers "bumped" into other positions with the company and the remaining three, lacking sufficient seniority, were laid off. Some four months later, these three laid off employees were recalled to non-cement train positions.

The drivers, being discontent with these events, lodged a grievance with the Committee. The grievance recited that Brown had violated the "Blue Book" by "virtually eliminating the work and classification of its Cement Train Drivers, and subcontracting (and/or otherwise transferring) said work to other employers and/or locations." In particular, the grievance asserted a violation of Articles X (which deals with seniority) and Article XIX of the "Blue Book." Article XIX is encaptioned "Job Protection," and provides as follows:

> "It is the intent of the parties to this Agreement to protect the work performed by employees in the bargaining unit.
>
> The Employer recognizes that it is important and desirable to utilize its own equipment and drivers to the greatest extent possible prior to using sub-haulers and/or non-company trucks.

The Union recognizes that under certain conditions, such as those dictated by customer demands, equipment requirements, daily dispatch determinations, materials to be hauled and similar factors, that sub-haulers and/or non-Company trucks are necessary and have been so utilized throughout the industry for many years.

The Employer, in accordance with the above, *must, however, determine the number, type and location of its working equipment in conformity with its business requirements.* The Employer further must be able to determine, in keeping with sound business practices, the extent to which it will replace equipment which is too costly to operate, obsolete or damaged.

Under these conditions, the Employer agrees that sub-haulers and/or non-Company trucks will not be utilized as a subterfuge to defeat the protection of the bargaining unit work.

In keeping with the above, the Union recognizes that the Employer will utilize such sub-haulers and/or non-Company trucks as required by location and classification only after all the available Company trucks at such locations and in similar classifications have been initially dispatched." [Emphasis supplied].

This grievance was heard by the Committee in February 1976. As required by the "Blue Book," the Committee was composed of three representatives from the Employers' Negotiation Committee and three representatives from the Union Negotiating Committee

(specifically, representatives of Teamsters Locals 235, 692 and 871). No representatives of Teamster Local 420 and no representative of Local 467 (with whom Brown had executed a "for-hire" agreement) sat on the Committee.[3]

After hearing the evidence and deliberating in executive session, the Committee unanimously denied the grievance. In unanimously denying the grievance, the Committee specifically considered the import of Article XIX of the "Blue Book," among other provisions, and Brown's argument to the Committee that Article XIX permitted it to "locate" its cement trains wherever called for by "business requirements."

Following this decision, Teamster Local 420 did *not* file, or seek to file any unfair labor practice charges with the National Labor Relations Board over the cement trains' transfer. Moreover, Teamster Local 420 did *not* seek to vacate this decision by a petition in state or federal court. The cement train drivers *did* file NLRB charges against Local 420 based upon a failure to adequately represent the drivers, but these charges were dismissed as lacking in merit. In addition, the drivers filed unfair labor practice charges against Brown, which charges resulted in the opinions below.

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[3] As noted, a representative of Teamster Local 871 did sit on the Committee. While it is true that Local 871 executed a "for-hire" agreement with Brown, no cement trains were ever located in Local 871's jurisdiction. Instead, all the trains were transferred to Teamster Local 467's jurisdiction, but these employees resigned from membership in Local 871 and became members of Teamsters Local 467. In addition, these former Local 871 members did not carry over any seniority into their positions as cement train drivers and were, therefore, treated as new hires.

Following a lengthy trial before an Administrative Law Judge (ALJ) of the NLRB, the ALJ in 1978 found (Appendix A) that Brown had not violated the National Labor Relations Act in any respects. In so finding, the ALJ prefaced his analysis with the following comments:

> "The pivotal question in this case is whether [Brown's] transfer of the cement train work . . . constituted a modification of the Blue Book or simply an action permitted by the Blue Book. If the action was a permitted one, there can be no finding that [Brown] unilaterally modified the contract in violation of Section 8(a)(5) of the Act. The threshold question is therefore one of contractual interpretation."

The ALJ then turned to the Committee's decision and viewed it binding upon the NLRB in two different and independent respects: First, it is binding as a negotiated agreement between the contracting parties over the meaning of the "Blue Book" as an extension of the bargaining process; secondly, it is binding if viewed as an arbitral determination of the dispute. In this latter respect, the ALJ noted that the Committee was fully competent to determine the factual question of whether Brown violated the contract. The NLRB, in turn, is bound by that factual determination.

In 1979, in a 3-2 decision, the NLRB reversed the ALJ (Appendix A). The three-member majority, over a strong dissent, concluded that it was not bound in any respects by the Committee decision. It reached this conclusion on the grounds that it "appeared" there was a "community of interest on the part of the Committee members which was in conflict with the interests of the

grievants and which would preclude the impartiality we deem necessary in an arbitration proceeding." This "community of interest" was founded exclusively upon the presumption that the three management representatives on the Committee would necessarily advance the interests of employers, particularly given the proliferation of "for-hire" agreements in the industry. (That proliferation, of course, was and is relied on in part by Brown to demonstrate that its conduct did not violate the "Blue Book.") In addition, the majority relied upon the fact that one of the three union representatives on the Committee was from Teamster Local 871 (see ftn. 3, *supra*). This bare NLRB majority ignored the fact that the Committee's decision was unanimous (meaning that the two clearly disinterested Committee members also denied the grievance) and ignored the fact that this method for dispute resolution by so-called "interested persons" is precisely what the parties had bargained for. The Board majority similarly ignored any consideration of the Committee's decision as an extension of the bargaining process, but viewed it exclusively as an "arbitration" award. Finally, the Board majority ignored the fact that the Committee did not purport to intrude upon the Board's province of statutory construction, but narrowly focused on whether its own contract had been breached.

In the 1979 decision, the slim Board majority did not really need to address the binding affect of the Committee's decision, for it concluded that the legality of Brown's actions did *not* "depend on an interpretation of the contract." Rather, the Board somehow concluded that the transfer of the cement trains constituted a "statutory" violation of § 8(a)(3) of the National Labor Relations Act, irrespective of the

contract's meaning.[4] The two dissenting Board members strongly disputed the majority's conclusion in this respect, as well as the majority's refusal to give any deference to the Committee's decision. In this latter regard, the dissent observed that "the majority position amounts to a rejection of any joint grievance committee as a body capable of impartially considering a grievance [because] such committees, by their nature, cannot be entirely neutral." (Appendix A).

Brown filed a timely petition for review of the Board's 1979 decision with the United States Court of Appeals for the Ninth Circuit, over which that court had jurisdiction pursuant to 29 U.S.C. § 160(f). In 1981, the Ninth Circuit granted the petition in part and remanded the case to the Board for further proceedings (Appendix B). The 1981 Ninth Circuit decision was again a split decision, with the dissent urging that the Board's decision should have been reversed *in toto*. The Ninth Circuit majority concluded that the Board majority had erred in considering the contract's meaning irrelevant. Therefore, the case was remanded to the Board to construe the contract. In so doing, the Board was directed to consider the language of the contract, as well as "industry practice, past practice, the statements of the parties, and the law of the shop . . . " (Appendix B). However, the Ninth Circuit majority, unlike the dissent, concluded that the Board

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[4] § 8(a)(3), 29 U.S.C. § 158(a)(3), prohibits discrimination against employees for the purpose of encouraging or discouraging union membership. The Board majority's holding in this respect is not material at this stage of the proceedings because as noted *infra*, the Ninth Circuit Court of Appeals reversed the Board in this respect.

majority did not abuse its discretion in refusing to defer to the Committee's decision *when viewed as an arbitration award*. The Ninth Circuit, as with the Board majority previously, did not draw *any* conclusions with respect to the affect of the Committee's decision when viewed as an extension of the bargaining process. Moreover, the Ninth Circuit affirmed the Board's refusal to defer to the Committee's decision in the context of the Board's earlier (and erroneous) conclusion that only "statutory" issues were at stake and the contract was irrelevant. This case does *not* involve the propriety of the Board's deferral practices where an arbitrator or grievance body purports to interpret statutory rights. On the contrary, it involves *only* the propriety of refusing to defer where established collective bargaining mechanisms have resolved pure contractual issues.

The NLRB accepted the Ninth Circuit's remand, and on February 28, 1986, issued a Supplemental Decision and Order (Appendix C), in which two Board members joined with one concurrence. The Board now concluded that Brown had breached the "Blue Book" and, consequently, violated § 8(a)(5) of the Act (by unilaterally modifying the contract). In reaching this conclusion, the Board ignored the statements of the parties as evidence of the contract's meaning and narrowly construed the industry and past practice in search of a "purple cow." In this connection, the comments of then District of Columbia Circuit Judge Scalia in *International Association of Bridge, Structural and Ornamental Iron Workers v. NLRB*, 792 F.2d 241 (D.C. Cir. 1986) on the subject of past practice are noteworthy: "[T]here is a difference between comparability and indentity, and only the former is needed."

More significantly, the Board continued to refuse any consideration of the Committee's decision as an extension of the bargaining process, even though the Board was now focusing specifically upon the "Blue Book's" meaning. As to whether they were obliged to defer to the Committee decision as an arbitral award, both the Board majority and the concurrence opined that they were bound, seemingly reluctantly, by the "law of the case."

Brown again timely sought review of the Board's 1986 decision and the Ninth Circuit again possessed jurisdiction by virtue of 29 U.S.C. § 160(f). The Ninth Circuit's abbreviated order denying review is contained at Appendix D.

REASONS FOR GRANTING THE WRIT

I

THE DECISIONS BELOW CONFLICT WITH DECISIONS OF THIS COURT, IN PARTICULAR THIS COURT'S MOST RECENT DECISION IN *UNITED PAPERWORKERS INTERNATIONAL UNION V. MISCO, INC.* ___ U.S.___, 56 USLW 4011 (1987) (No. 86-651).

As recited above, the NLRB with the Ninth Circuit's approval refused to consider itself bound by a contractual (not statutory) interpretation made in accordance with the bargaining parties' agreed-upon method of resolving contractual disputes. This refusal was based upon treating that method as an "arbitration" and, in effect, vacating the "arbitration award" on the grounds that some of the decision-

makers were somehow generally "interested" in the outcome. Similarly, the NLRB with the Ninth Circuit's approval, refused to treat the Committee's decision as a continuation of the bargaining process and, as such, dispositive of the issue of contractual interpretation even if "interested" persons participated in that bargaining process. This outcome is directly in conflict with this Court's precedent.

This Court has repeatedly commented upon the central role private dispute resolution processes occupy in the disposition of labor/management disputes and in promoting industrial harmony. Perhaps the comments most opposite to the instant case are contained in *United Steel Workers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 578-581 (1960):

> "The present federal policy is to promote industrial stabilization through the collective bargaining agreement. [Citation omitted] A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement. . . . For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself. . . . [T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. . . . The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement. . . . The *grievance procedure is, in other words, a part of the continuous collective bargaining process.*" [Emphasis supplied].

Similarly, in *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960), this Court, after quoting § 203(d) of the Labor Management Relations Act, 29 U.S.C. § 173(d), stated that the policy of § 203(d), "can be effectuated *only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play.*" [Emphasis supplied].

In the instant case, it is clear that the grievance procedures of the "Blue Book," culminating in the final and binding decision of the Committee, "are the means chosen by the parties for settlement of their differences." Federal labor policy can be achieved only if those means are given "full play." Whatever legitimacy may exist in the NLRB's refusal to defer to such methods when those methods have purported to resolve a *statutory* question squarely within the Board's province, there is *no* justification for refusing to be bound by a pure *contract* interpretation. § 203(d) of the Labor Management Relations Act of 1947 declares that the methods agreed upon by the parties are the desirable methods for resolving disputes "over the application or interpretation of an existing collective bargaining agreement." No one has ever suggested that the NLRB is the desirable method for resolving such disputes. If the bargaining parties can be second-guessed about the meaning of their own contract — whether by the Board or by a court — much of the rationale for negotiating dispute resolution mechanisms in the first place will be lost. If that rationale is lost, the parties will turn to either industrial conflict or litigation to resolve their differences. In either event, federal labor policy will be frustrated.

The absence of procedural niceties does not abrogate the binding effect of grievance committee decisions, as this Court has held. *Humphrey v. Moore*, 375 U.S. 335 (1964). In *Humphrey*, a union represented the employees at each of two plants. When the operations of the two plants were integrated, a dispute over the seniority rights of the two groups of employees was brought before a labor-management committee for resolution. This court found the committee's decision binding, *even though* the union argued on behalf of one group of employees before the committee *and* the union composed one-half of the committee:

> "Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these circumstances would surely weaken the collective bargaining and grievance process. *The decision of the committee, reached after proceedings adequate under the agreement, is final and binding upon the parties, just as the contract says it is. Humphrey, supra* at 382-383.

It would seem that *Humphrey*, standing alone, is dispositive of this case, and adequately puts to rest any concern over the "interest" of the members of the "Blue Book" Committee.

Just this past December, this Court once again emphasized the central role arbitration plays in federal labor policy. In *United Paperworkers International Union v. Misco, Inc.*, ___ U.S. ___, 56 USLW 4011, (1987) (No. 86-651) a lower federal court had vacated an arbitration award reinstating an employee accused of possessing marijuana. This Court held that vacation to be improper. In the course of its decision, the *Misco*

court made the following germane observations on the primacy of private labor dispute mechanisms:

> "Collective bargaining agreements commonly provide grievance procedures to settle disputes between union and employer with respect to the interpretation and application of the agreement and require binding arbitration for unsettled grievances. . . . [*F*]*ederal statutes regulating labor-management relations . . . reflect a decided preference for private settlement of labor disputes without the intervention of government*. . . . Furthermore, it must be remembered that grievance and arbitration procedures are part and parcel of the ongoing process of collective bargaining . . . *The parties* bargained for arbitration to settle disputes and *were free to set the procedural rules* for arbitrators to follow if they chose. . . . A refusal to endorse an award must rest on more than speculation or assumption."

Although *Misco* was decided in the context of a court's power to vacate arbitration awards, the Court's admonitions would seem equally applicable to the Board's power to vitiate otherwise binding contractual interpretations. Thus, the Court notes the decided preference for resolving labor disputes by private means "without the interference of government" — be it in the form of a court or an administrative agency. Even if the NLRB were allowed a freer hand to treat with arbitrations that decide statutory questions (e.g., where an employee is allegedly terminated for union activity), there is no justification consistent with *Misco* or federal labor law generally to permit the Board such latitude where, as here, only contract issues are at

stake. If it should be argued that the Board properly disregarded the Committee's decision because the committee members were "interested" in the outcome, that argument too is plainly contrary to *Misco*. First, as the dissenting Board members pointed out in the original Board decision, the majority's finding of such "interest" was based on "speculation or assumption." Secondly, the parties bargained for decisions by "interested" persons, therefore the Board's decision frustrates the bargaining parties' intent, contrary to *Misco*. Finally, *Misco* observes that an arbitral decision may be set aside only where it has been "procured by the parties through fraud or through the arbitrator's dishonesty." There is not one hint of fraud or dishonesty in this case and the Board's conclusion of "interest" hardly rises to the *Misco* standard.

Moreover, as the *Misco* decision notes at footnote 10, the Board here exercised far more power than a court may ever exercise. Thus, this Court observed that,

> "Even in the very rare instances when an arbitrator's procedural aberrations rise to the level of affirmative misconduct, as a rule the court must not foreclose further proceedings by settling the merits according to its own judgment of the appropriate result since this step would improperly substitute a judicial determination for the arbitrator's decision that the parties bargained for in the collective bargaining agreement. Instead the court should simply vacate the award, thus leaving open the possibility of further proceedings if they are permitted under the terms of the agreement."

Here, the Board as approved by the court below, evinced the utmost arrogance towards the parties' own interpretation of their agreement by not only "vacating" that interpretation but substituting the Board's construction of the contract in its place. The Board's almost off-handed, single paragraph construction of the agreement is no proper substitute for the parties' own deliberative process.

II

THE BOARD'S AND THE COURT OF APPEAL'S REFUSAL TO GIVE ANY WEIGHT TO THE GRIEVANCE COMMITTEE'S CONTRACT INTERPRETATION IS IN CONFLICT WITH OTHER CIRCUITS, AS WELL AS THE BOARD'S AND THE COURT OF APPEAL'S OWN DECISIONS.

Not only does the Board's decision, as adopted by the court below, conflict with the decisions of this Court, but it conflicts with the decisions of other Circuits, subsequent Board decisions, and other decisions of the Ninth Circuit. It is little wonder then, that in the Board's supplemental decision (Appendix C), the Board apologetically abstained from giving any deference to the Committee's contractual interpretation solely because of the "law of the case."[5]

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[5] Even though the most recent Ninth Circuit decision (Appendix D), does not address the binding effect of the Committee's decision, it is clear that this Court may now consider the propriety of the Ninth Circuit's earlier opinion (Appendix B) on that subject. Stern, Grossman & Shapiro, Supreme Court Practice § 2.4 p.46 (6th Ed. 1986); *N.Y. Telephone Co. v. Maltbie*, 291 U.S. 645 (1934);

At least two other Circuits, as opposed to the Ninth Circuit, have held that the Board errs when it refuses to give binding effect to a pure contractual determination.

The First Circuit has unequivocally stated that the Board may not simply forget a joint-grievance decision, even though the Board may refuse to defer to such a decision in carrying out its statutory obligations. *NLRB v. Wilson Freight Co.* 604 F.2d 712 (1st Cir. 1979). In *Wilson*, the company assertedly terminated a steward for just cause. Its position was vindicated, as here, by a 6-0 joint-committee decision. The Board, however, refused to defer to this decision because the committee had not considered the steward's unfair labor practice claim. The *Wilson* court denied enforcement of the Board's order. In reversing the Board, the First Circuit stated as follows:

> "*The Board and ALJ apparently felt that because the arbitration* was not conclusive upon fair labor practices issues, it *was altogether irrelevant. In this they were mistaken.* . . . Given the arbitrator's close association with the trucking industry, and their role as interpreters of the contract, *the Board could not properly shrug off their conclusions.*" (emphasis supplied). *Wilson Freight, supra* at 722-723.

Public Service Comm'n v. Brashear Freight Line, 306, U.S. 204 (1939); *Mercer v. Theviot*, 377 U.S. 152 (1964). Even if this were not so, this Court may properly consider the Board's failure in its latest opinion, as approved by the Ninth Circuit's November 6, 1987, ruling, to give any weight to the Committee's decision when the Board was finally forced to acknowledge that the contract's meaning was controlling in this dispute.

The court then concluded that the Board "should have begun with the premise that the conduct constituted just cause for discharge," rather than writing off the steward's misconduct "as too innocuous to constitute valid grounds for discharge under the contract." *Wilson Freight, supra* at 723.

The District of Columbia Circuit has similarly held that the Board is not free to ignore an arbitrator's award in interpreting the provisions of a collective bargaining agreement. In *Fournelle v. NLRB*, 670 F.2d 331 (D.C. Cir. 1982), an employer suspended an employee who was also a union representative for ten days after he participated in a "wildcat strike" prohibited by the collective bargaining agreement. Other rank-and-file employees who had also engaged in the walkout were only given 5-day suspensions. He, therefore, filed unfair labor practice charges against the company, alleging that his longer suspension violated the National Labor Relations Act. An Administrative Law Judge found that there was, indeed, a valid no-strike provision in the collective bargaining agreement which had been violated; but the ALJ further found that the company had violated the Act by suspending Fournelle for a greater length of time due to his union status. A divided panel of the NLRB affirmed the ALJ's findings and conclusions. Significantly, both the ALJ and the Board ignored a prior arbitration decision, rendered pursuant to the Agreement, holding that union officials working under the Agreement had "higher duties during strikes than rank-and-file employees, and that the breach of those duties may subject union officials to more severe discipline." *Fournelle, supra*, at 342. Noting that the

Union "has not attempted to challenge the validity of [the] suspension," the court said:

> "Despite the contentions of the Board and Fournelle to the contrary, the decision interpreted the agreement to allow [the company] to selectively discipline union officials who disobey the no-strike clause. . . . The remaining question is whether the award should have been given precedential effect by the Board. If the award should be given precedential effect, our inquiry need go no further: If the collective bargaining agreement authorized [the company's] selective discipline of Fournelle, then . . . the Board erred in finding that discipline to constitute an unfair labor practice." [*Ibid*, 670 F.2d at 342-343, (footnote omitted)]

Recognizing that "the arbitrator's rulings may be as important a source of the rights and obligations of the parties as the contractual document itself," and noting further that "[a]n award interpreting a collective bargaining agreement usually becomes a binding part of the agreement and will be applied by arbitrators thereafter [citation omitted]," the court said:

> "[w]e hold that the Board was not free either to ignore the meaning of the contract or to substitute its own interpretation of the contract for the interpretation of the arbitrator" [670 F.2d at 345 (footnote omitted)].

Or, as the court succintly put it in a footnote, "To go further and require that the *Board* rather than the arbitrator must be the one to declare the meaning of the parties' agreement would give to the Board a power that Congress has denied it." 670 F.2d at 343, ftn. 21.

Cf., *Kohls v. NLRB*, 629 F.2d 173 (D.C. Cir. 1980) (" . . . in a case such as the instant one, which involves a contractual claim unrelated to an unfair labor practice, the Board has no authority to resolve the contractual issue.") Compare also *Shores v. Peabody Coal Co.*, 831 F.2d 1382 (7th Cir. 1987), holding that individual employees lack standing under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, to vacate an arbitration award where only the union and employer were parties and the union elected not to contest the arbitrator's decision. Why should employees, as here, be able to vacate an arbitration award by appealing to the NLRB, when they may not do so under § 301?

The decision below is even contrary to the Ninth Circuit's holdings in analogous cases. Thus, in *DeSoto v. Yellow Freight Systems, Inc.*, 811 F.2d 1333 (9th Cir. 1987), the court observed that an employee who seeks to challenge a grievance committee decision "cannot expect the grievance procedure 'to be error free.' " The court then concluded that "if the union has fairly represented him in the grievance process, an employee must as a matter of law lose in an attack upon the arbitration decision." Here, the union in fact fairly represented the cement train drivers before the Committee and, under the *DeSoto* standard, any attack upon the Committee's contract interpretations should lose "as a matter of law." The result should not differ merely because the NLRB has interjected its views on the propriety of a grievance committee's decision dealing purely with contract questions before that decision has been reviewed by a court. See also, *Toyota of Berkeley v. Local 1095*, 834 F.2d 751 (9th Cir. 1987) and *Sheet Metal Workers International Association v.*

Kinney Air Conditioning Co., 756 F.2d 742 (9th Cir. 1985) (where the Ninth Circuit in both cases held that "the appearance of impropriety, standing alone, is insufficient" to successfully attack the decision of a grievance committee or an arbitrator); *LaMirada Trucking, Inc. v. Teamsters*, 538 F.2d. 286, 288 (9th Cir. 1976) (the NLRB does not have the power to render arbitral decisions void unless the decision itself constitutes an unfair labor practice).

Although the Board's own history of deferral to arbitration/grievance panel decisions is hardly a model of consistency, its decision in the instant case is clearly contrary to its own prior decisions. For example, in *Bailey Distributors*, 278 NLRB No. 17, 121 LRRM 1121, *rev'd.* on other grounds, 796 F.2d 14 (2nd Cir. 1986), the Board deferred to an arbitral determination *despite* claims of conflict of interest. The conflicts were based upon the fact that (a) the grievant and the union were "at odds" on the issue at stake, with the union taking the employer's side, (b) the grievant was not a union member, (c) the grievant had sued both the union and the employer, (d) the union's attorney and the grievant's attorney were hostile towards one another, and (e) the arbitrator was a permanent umpire, named in the contract, and therefore his interests lay in serving the contracting parties, as opposed to the grievant. The Board in *Bailey* rejected these conflicts as a basis not to defer (*even though* statutory issues were at stake, unlike the present case), holding that the party seeking to avoid deferral "has not demonstrated that 'actual and potential conflicts of interest' rendered the arbitration proceeding not fair and regular. . . . As the arbitrator acted impartially, there has been no showing that a potential conflict had

an effect on the arbitration proceedings." *Bailey at 1124, ftn. 9.* Similarly, in *Cincinnati Local 270, Lithographers (United States Playing Card Co.)*, 204 NLRB 418 an arbitrator's decision was admitted into evidence "solely for the purpose of deciding the proper interpretation of the collective bargaining agreement. . . ." *U.S. Playing Card, supra*, at 421, ftn. 5. Once admitted, that decision was given the following binding effect:

> "This arbitrator's award then became the law of the shop and I conclude . . . I am obliged to find it binding upon me in resolving the unfair labor practice issue in the instant case.
>
> . . .
>
> "[A]n arbitration award has here issued which lays to rest the contractual issue." *U.S. Playing Card, supra*, at 423 and 418.

In cases where, as here, a company has allegedly modified its collective bargaining agreement in violation of § 8(a)(5) of the Act by relocating work during the agreement's term, the Board has concluded that arbitration/grievance panel decisions are not only persuasive but dispositive. Thus, in *Reichold Chemicals*, 275 NLRB 1414, 1415-1416 (1985), the Board commented as follows:

> "The [Administrative Law] Judge correctly found that the arbitration issue is one of contractual interpretation while the unfair labor practice issue is whether the Respondent failed to bargain in good faith about a mandatory subject of bargaining. These issues, however, both turn on whether the contract permitted [the employer's actions] and therefore they should be resolved by the

> same facts, i.e., the parties' collective bargaining agreements, relevant bargaining history, and past practice. Thus, the issues are factually parallel."

As a final example of Board holdings which are contrary to or inconsistent with the present case, in *Pinkerton's Inc.* 270 NLRB 27 the company was accused of allegedly modifying its labor agreement in mid-term by relocating work. The Board decided to defer to arbitration because "the controversy in issue essentially is one of contract interpretation." *Pinkerton's, supra,* at ftn. 1.

III

THE EXTENT OF THE NLRB'S POWER TO DISREGARD OTHERWISE BINDING CONTRACTUAL INTERPRETATIONS BY PRIVATE GRIEVANCE/ARBITRATION PROCEDURES HAS NEVER BEEN SQUARELY ADDRESSED BY THIS COURT. SINCE THE EXTENT OF THAT POWER INVOLVES AN IMPORTANT QUESTION OF FEDERAL LABOR LAW, THE COURT SHOULD GRANT THIS WRIT.

In one form or another, the NLRB has had a policy of deferring to arbitral determinations for over thirty years, beginning with *Spielburg Manufacturing Co.*, 112 NLRB 1080 (1955). During this thirty year history, literally thousands of cases dot the official reports bearing on the issue. To say that inconsistency and lack of clarity are evident would be a considerable understatement. Nevertheless, this Court has never

squarely ruled on the propriety of the Board's deferral policies, nor outlined the permissible parameters of those policies. 13 Conn. L. Rev. 397, 408 (1981). This Court has suggested that § 203(d) of the Labor Management Relations Act of 1947 may require the Board to defer, because deferral "harmonizes with Congress' articulated concern" reflected in § 203(d). *William E. Arnold Co. v. Carpenters*, 417 U.S. 12, 17 (1974).

In 1983, three Justices of this Court favored granting certiorari in the case of *Shaefer v. NLRB*, 464 U.S. 945 (1983). *Shaefer* involved the Board's refusal to defer to an informal settlement of unfair labor practice charges reached between a union and a company. In dissenting from the denial of certiorari, Justice O'Conner commented as follows:

> "Were this simply an isolated instance of law being erroneously applied to the facts of this case I would not suggest that the Court expend its time and resources reviewing it, but the opinions of the Courts of Appeals strongly suggest that there is marked disagreement on the circumstances under which the policy of Board deferral must be exercised. See, e.g., *Roadway Express, Inc. v. NLRB*, 647 F.2d 415, 422-423, and n 15 (CA4 1981) (noting four opinions of Board and criticizing inconsistent applications of deferral policy to nonarbitral settlements); *NLRB v. Pincus Brothers, Inc.-Maxwell*, 620 F.2d 367 (CA3 1980) (three opinions on application of deferral policy to arbitral settlement); *Douglas Aircraft Co. v. NLRB*, 609 F.2d 352 (CA 9 1979) (Board must defer to arbitral settlement unless it is "palpably

> wrong"). In my opinion, this intercircuit confusion makes this case appropriate for certiorari review.
>
> Moreover, I believe that an essential aspect of our national labor policy is at stake in this case. A commitment to private dispute resolution undergirds our entire national labor policy, which recognizes that the societal rewards of private negotiations outweigh any need for uniformity of result or adjudicative resolution of every labor dispute. Parties accept the risk that private settlements will differ from possible Board dispositions when they elect to proceed by negotiation, and the Board recognizes such possibilities when it adopts a policy of deference. The Board's deferral policy is deeply rooted in our national commitment to private dispute resolution and, until openly and expressly changed, must be applied uniformly and strictly. Private dispute resolution processes become unworkable if their finality is cast into doubt by the prospect of unprincipled Board interference. When there is confusion about the circumstances in which deference will be exercised, employers and employees cannot be fully committed to private dispute resolution as a means of achieving industrial stability. I would therefore grant certiorari to clarify the application of this important national labor policy.

Nothing has occurred in the intervening five years since the *Shaefer* case to allay the "intercircuit confusion." Likewise, nothing has occurred to make this issue any less "an essential aspect of our national labor policy." Moreover, Petitioner submits that the

instant case is even more appropriate for the granting of certiorari than the *Shaefer* case, for (a) it concerns an adjustment made by a grievance panel under the parties' collective bargaining agreement, as opposed to an informal settlement and (b) it concerns a determination on pure contract issues which, at most, are only peripherally within the Board's province.

CONCLUSION

For the foregoing reasons, this Petition on Writ of Certiorari should be granted.

Dated: February 4, 1988

Respectfully submitted,

STUART H. YOUNG, JR.

HILL, FARRER & BURRILL
445 So. Figueroa Street
34th Floor
Union Bank Square
Los Angeles, CA 90071-1666
(213) 621-0460

Attorneys for Petitioners

APPENDIX A

Decision and Order of the National Labor Relations Board, 243 NLRB 769 (1979)

Brown Company; Brown Company, Livingston-Graham Division; Brown Company, Tri-City Concrete Divison; L-T Transport, Inc. *and* **Kris A. Borum**
Brown Company, Livingston-Graham Division *and* **Kris A. Borum,** Cases 21-CA-14732-1 and 21-CA-14732-2

July 30, 1979

DECISION AND ORDER

On April 21, 1978, Administrative Law Judge Richard D. Taplitz issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party filed exceptions and supporting briefs, and Respondent filed cross-exceptions and a reply brief and brief in support of cross-exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only where they are consistent herewith.

The General Counsel and the Charging Party have excepted to the Administrative Law Judge's dismissal of the complaint herein based on his deferral to an award made by a joint labor-management grievance committee. We find merit in these exceptions.

Livingston-Graham and Tri-City are divisions of Brown Company are engaged in the manufacture and transportation of rock, sand, gravel, and ready-mixed concrete products. L-T Transport, Inc., also owned by Brown, was formed in 1975 and is engaged in the transportation of bulk cement. The Administrative Law Judge found that Brown, Tri-City, Livingston-

Graham and L-T constitute a single employer within the meaning of the Act. We agree with this finding.

The facts are set out in the Administrative Law Judge's Decision and need not be repeated fully here.

This case involves the transfer of work which was performed by employees of Livingston-Graham to L-T while Livingston-Graham was party to a collective-bargaining agreement, covering such work, with Building Material & Dump Truck Drivers Local 420, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called Local 420), Intervenor in this proceeding.

Prior to January 1976, part of Livingston-Graham's operations involved the hauling of bulk cement aboard "cement trains," special tractor-trailer trucks designed for such hauling. It operated 7 of these trucks and employed 12 drivers in this operation. Most of its cement hauling involved the delivery of cement from cement companies to Livingston-Graham's own locations to satisfy its own needs. However, on some occasions, Livingston-Graham also hired out its cement trains (with drivers) to cement companies for the hauling of cement to other customers of the cement companies, a so-called for-hire arrangement. The cement train drivers employed by Livingston-Graham were part of a unit of some 200 of its employees represented by Local 420 and covered under the "blue book" contract between Rock Products and Ready Mixed Concrete Employers of Southern California and a number of Teamsters locals, including Local 420.

In the early 1970's, many of Livingston-Graham's competitors in the ready-mix business began forming satellite cement hauling companies which operated under for-hire collective-bargaining agreements with

different Teamsters locals including Local 420. In the spring of 1975, Respondent's officer, Dyck, became aware that one of Livingston-Graham's competitors, Con Rock, had formed such a company and had signed for-hire collective-bargaining contracts with Teamsters locals including Local 420. Under these contracts, the cement train drivers were paid substantially lower wage rates than Livingston-Graham's drivers were receiving under the blue book contract between Livingston-Graham and Local 420.

Dyck informed Local 420's secretary-treasurer, Traweek, that Respondent intended to form a new company, L-T, and transfer its cement trains from Livingston-Graham and Tri-City (which also had cement trains whose drivers were represented by Local 467), to L-T. Under Dyck's proposal, if Local 420 agreed to sign a for-hire contract, the trucks, although operated by L-T, would remain at the Livingston-Graham location. The employees presently driving the trucks could transfer to the employ of L-T, retain their seniority, and work under the lower wage rate or, based on their seniority, bump back into other jobs at Livingston-Graham. If they did not have sufficient seniority to bump, they would be laid off. Traweek informed Dyck that he would sign the for-hire contract only if authorized by the drivers he represented.

Following meetings with the employees at which both Dyck and the union representatives attempted to persuade the employees of the benefits of Dyck's proposal, the employees withheld their approval and Local 420 refused to sign the for-hire contract. Meanwhile, Locals 467 and 871, with jurisdiction over locations where Tri-City had its operations, signed such a contract with Respondent. Thereafter, employ-

ees of Tri-City were given first opportunity to transfer to the driving jobs at L-T. No such invitation was extended to Livingston-Graham employees.

On December 31, 1975, all of Livingston-Graham's cement trains were transferred to Tri-City's Redlands location where, January 2, 1976, L-T began its cement hauling operations, utilizing drivers formerly employed by Tri-City and represented by Locals 467 and 871. At the same time all but three of Livingston-Graham's former cement train drivers bumped into other jobs with that Company. Three, including the Charging Party herein, had insufficient seniority to bump and were laid off for a period of months.

On January 24, 1976, the Charging Party and other former cement train drivers of Livingston-Graham filed a grievance under the blue book contract between Local 420 and Livingston-Graham over the transfer of work to L-T. The grievance was heard by the grievance committee under step two of the grievance procedure on February 19, 1976. Traweek was the presiding cochairman of the committee, although he did not participate in the deliberations or vote on the grievance. The committee consisted of three representatives from unions and three from management. The three union representatives were from Locals 235, 692, and 871. Management was represented by the retiring industrial relations director for the employer association and his successor, and Clemente, from another contracting company.

Shortly after the Union began its presentation of the grievance, the Charging Party interrupted, claiming that the Union was not fairly representing the grievants. She was then allowed to present her own case, during which she argued that Livingston-

Graham's transfer of the work to L-T was violative of various sections of the contract.

Dyck argued for Livingston-Graham that the sale of the trucks to L-T was for economic reasons to meet the competition of cement hauling companies, that it had bargained with Local 420, and that it had a right under the contract to sell the equipment. After hearing the testimony, the committee deliberated and denied the grievance.

In dismissing the 8(a)(3) and (5) allegations of the complaint, the Administrative Law Judge deferred to the grievance committee's denial of the Charging Party's grievance. As the committee had agreed that Respondent's action was not violative of the contract, the Administrative Law Judge found that no violation lay under the Act. We disagree.

In determining whether it will honor the award of an arbitrator or an arbitration panel in deciding an unfair labor practice case, the Board looks to see whether the arbitration proceedings appear to have been fair and regular, whether all parties to the proceedings have agreed to be bound by the arbitration award, and whether the arbitration decision is not clearly repugnant to the purposes and policies of the Act.[1] In our opinion the proceedings before the committee here, and the award it made, do not meet this test.

Although the Board has honored the awards of joint committees such as the committee in the instant case, we will not honor such an award where it appears that members of the committee have interests which are directly in conflict with those of the grieving party. In

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[1] *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955).

this case, one of the representatives on the committee was from Local 871, which represented some employees of Tri-City, but had no jurisdiction over cement train drivers. However, prior to the grievance hearing here, Local 871 had signed a for-hire contract with Respondent, and its members who worked for Tri-City had been invited to, and some did, transfer to L-T cement train drivers filling jobs formerly held by the grieving parties.[2] Likewise, two of the management representatives on the committee were the retiring industrial relations director of the employer association and his successor, people whose function it is to act in the best interest of the association's employer-members, including Respondent and other companies who, like Respondent, had formed satellite companies and signed for-hire contracts with local unions. The third member from management was Clemente, of Sully-Miller Contracting Company, which had also formed a for-hire cement company. It appears to us that this situation necessarily created a community of interest on the part of the committee members which was in conflict with the interests of the grievants and which would preclude the impartiality we deem necessary in an arbitration proceeding. Under such circumstances we will not honor the award of that committee in deciding the unfair labor practice allegations before us.[3]

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[2] As a result of a grievance decision, three employees were not allowed to keep the seniority they had with Tri-City pertaining to bidding and bumping rights. They did maintain their seniority pertaining to such things as vacation, insurance benefits and other matters.

[3] Additionally, we note that the evidence before us concerning the grievance proceedings is scant and sheds little light on what

We also do not agree with the Administrative Law Judge that the legality of Respondent's actions here depend on an interpretation of the contract which can best be made by the greivance committee as an extension of the collective-bargaining process. Rather, Respondent's actions must be judged by their conformity with statutory law.

As the Administrative Law Judge correctly noted, we have held that a unilateral removal of bargaining unit work during a contract term is the type of contract modification proscribed by the Act, regardless of economic justification. Further, under Section 8(d) of the Act, a party to the contract cannot be compelled to

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matters were considered by the committee in its deliberations. All that is shown is that the committee accepted Dyck's explanation of economic necessity and found that he did not violate art. X and XIX of this contract. Yet, in considering art. XIX, which deals with job protection of employees and the right of the Employer concerning subcontracting its hauling, there is little and vague evidence that the committee considered the single-employer nature of Respondent's operations as they relate to the transfer of work involved here. It is also clear that the committee did not consider the unfair labor practice issue presently before the Board. Further, although, as noted by the Administrative Law Judge, there is no 8(b)(1)(A) charge before us alleging that the Union did not fairly represent the grievants, the evidence is clear that, prior to and during the grievance proceedings, the positions of the Union and the grievant, Borum, were not in harmonious accord. All of these factors weigh in our finding that deferral to the committee award is not suitable in this case. /fn Member Jenkins concurs in this finding. For the reasons given in his dissents in *Automotive Transport, Inc.*, 223 NLRB 217 (1976); *Terminal Transport Company, Inc.*, 185 NLRB 672 (1970); and *United Parcel Service, Inc.*, 232 NLRB 1114 (1977), he would not defer to an award rendered by a panel without an outside neutral member to provide impartial consideration of the grievance.

bargain about such a modification and, accordingly, any modification can be implemented only with the consent of the other party.[4]

In the instant case it is clear that Local 420 agreed to sign the for-hire agreement only with the authorization of the concerned employees, which was not forthcoming. As a result of this refusal to sign the contract, Respondent moved its trucks and deprived the drivers of the jobs they were entitled to under the existing contract. Some drivers were laid off and others were forced to bump into less desirable positions at Livingston-Graham.

It is also clear that Respondent took this action for the sole purpose of escaping from its wage obligations under the existing collective-bargaining contract. Had the employees and Local 420 agreed to a contract containing substantially lower wage rates than the blue book contract under which they were covered, Respondent would have left the trucks at Livingston-Graham and the drivers would have retained their jobs. By transferring its trucks to L-T, Respondent thus did partially abrogate the existing blue book contract with Local 420.

It matters not whether Respondent's transfer of its trucks was a result of union animus, nor that it first bargained with the Union and attempted to get it to sign a new agreement. It is obvious that Respondent's actions were "inherently destructive of employee

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[4] See *Los Angeles Marine Hardware Co., a Division of Mission Marine Associates, Inc., and California Marine Hardware Co., a Division of Mission Marine Associates, Inc.*, 235 NLRB 720 (1978), and cases cited therein.

interests"[5] and that the employees lost the jobs to which they were entitled as a result of Respondent's efforts to escape its economic obligations under the contract. Such conduct is violative of Section 8(a)(3) and (1) of the Act.[6]

The above finding is not precluded by the fact that Local 420 has apparently abided by the decision of the grievance committee, or that the Union has not filed a charge with the Board. As noted, we will not honor the committee's award because it does not conform to the *Spielberg* criteria. However, in light of the Union's apparent silent acceptance of the committee's decision, and the fact that we are able to remedy adequately Respondent's unfair labor practices as found, we find it unnecessary to pass on whether Respondent also violated Section 8(a)(5) of this Act.[7]

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[5] *Rusion & Mercier Woodworking Co., Inc.*, 203 NLRB 123 (1973).

[6] *Los Angeles Marine Hardware Co., supra.* and cases cited therein. Were economic necessity a consideration to justify actions in a case such as this, we would here find that Respondent has failed to show such a necessity. Its claim that lowering wages was necessary for it to be competitive with other cement hauling companies is unconvincing, as the record shows that the minimum rates charged by for-hire cement haulers to cement companies is set by the Public Utilities Commission and, according to Dyck's testimony, all the cement haulers charged the same rate. It would thus appear that, although having lower wage rates would allow Respondent to increase its profits (and the record shows Livingston-Graham's cement hauling operation was profitable), it would not affect the competition factor.

[7] Contrary to our dissenting colleagues' representation, we do not consider the Union's not contesting the grievance committee's decision, for whatever reason, tantamount to consenting to the actions of Respondent. The record is quite clear that Local 420 at no time gave the consent necessary to legitimatize Respondent's

CONCLUSIONS OF LAW

1. Brown Company; Brown Company, Livingston-Graham Division; Brown Company, Tri-City Concrete Division; L-T Transport, Inc., are each employers within the meaning of Section 2(2) of the Act engaged in commerce and in businesses affecting commerce within the meaning of Section 2(6) and (7) of the Act and collectively constitute a single employer within the meaning of the Act.

2. Building Material & Dump Truck Drivers Local 420, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. A unit appropriate for collective bargaining is:

> All drivers of plant and pit trucks, two-axle dump trucks, three-axle dump trucks, semis, truck-trailer and semis, cement-trains, mixer trucks, flats, flat truck-trailer and semis, mobile service trucks, mobile sweeper driver, warehousemen, automotive repairmen, batch plant operators, bunkermen, gas station operation and/or fueler, loaders, washers, greasers, firemen, and chippers employed by Livingston-Graham within the geographical jurisdiction of Local 420; excluding all employees properly covered by other bargaining units, office clerical employees, technical and professional employees, guards, watch-

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unilateral actions.

men, and supervisors as defined in the National Labor Relations Act, as amended.

4. At all times material, Building Material & Dump Truck Drivers Local 420, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, has been the exclusive collective-bargaining representative of the employees in the above-described unit within the meaning of Section 9(a) of the Act.

5. By discontinuing its cement hauling operations at Livingston-Graham's locations in Vernon and El Monte, California, and selling and transferring its trucks to L-T Transport, Inc., at its Redlands, California, location, with the object of withdrawing this work from the bargaining unit for which Local 420 is the contractually recognized representative under the terms of its then existing collective-bargaining agreement, Respondent unlawfully deprived employees Louis H. Bering, Kris A. Borum, William R. Cannon, Anthony Giangreco, Clarence Hudson, James Jaworski, Harry D. Potts, Robert L. Reilly, Carmen Rosselli, Robert L. Schaffer, Donald H. Thomas, and James A. Wilson of the employment to which they were entitled, thereby violating Section 8(a)(3) and (l) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

The General Counsel has requested that Respondent be required to transfer back to its Livingston-Graham locations the trucks which it transferred to L-T on or about December 31, 1975; that it reinstate the drivers

who formerly drove those trucks for Livingston-Graham to their former positions, making them whole for any loss of wages they may have suffered; and that it be required to continue to recognize and bargain with Local 420 as the collective-bargaining representative of these employees.

Given the nature of Respondent's unfair labor practices, such a remedy seems appropriate to restore the *status quo ante*. Further, there is no evidence to show that this remedy creates an undue hardship on Respondent. Respondent, as a single employer, remains in the cement hauling business and maintains its own fleet of trucks for this purpose. As noted by the Administrative Law Judge, there is substantial functional integration between Livingston-Graham and L-T, including the dispatching and repair of the trucks, clerical work, and the sharing of a common sales force. We will therefore grant the remedy requested by the General Counsel. Where backpay is required, it will be paid with interest on on the amounts owning, and computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

. . .

Members Penello and Murphy, dissenting:

This is another instance in which our colleagues give lip service to the *Spielberg* principle[9] but in fact whittle away at its substance. Contrary to our colleagues, we would affirm the Administrative Law Judge's finding that Respondent did not violate Section 8(a)(5) and (3)

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[9] *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955).

of the Act and would dismiss the complaint in its entirety.

The essential facts are complex and bear recounting. Brown Company is engaged in the manufacture and transportation of rocks, sand, gravel, and ready-mixed concrete products. Livingston-Graham is a division of Brown which has 4 rock plants and 11 or 12 batch plants in Orange, Los Angeles, and Ventura Counties. It employs between 400 and 500 employees. Some 200 of its employees are represented by Teamsters Local 420 under the terms of a contract between Rock Products and Ready Mixed Concrete Employers of Southern California and Locals 420, 692, 495, 88, 982, 235, and 871, Teamsters. The contract is referred to as the blue book. Among the job classifications set forth in the contract is that of "drivers of cement trains." Prior to January 2, 1976, Livingston-Graham operated 7 trains and employed 12 cement train drivers. All of these drivers were members of Local 420 and were covered by the blue book.

Tri-City is also a division of Brown engaged in substantially the same business as Livingston-Graham. It has several plants in San Bernardino and Riverside Counties and employs some 100 employees. About 50 to 55 of Tri-City's employees are covered under a contract with Teamsters Local 467, referred to as the orange book. Before January 2, 1976, Tri-City had two cement trains and four cement train drivers at its Redlands location. These drivers were covered by the orange book. The remainder of Tri-City's employees are covered by an agreement between Tri-City and Teamsters Local 871 that the terms of Local 467's contract are to govern. None of the cement trains has ever been housed in Local 871's jurisdiction.

Livingston-Graham's cement trains were used primarily as part of its own operation. Occasionally, Livingston-Graham hired its cement trains to cement companies which made deliveries to other customers. The same was true of Tri-City's operations.

In April 1975, Livingston-Graham informed Local 420 that it wanted to form a cement hauling company, transfer the seven cement trains to that company, and work out an agreement with the Union whereby the cement trains could operate under a for-hire contract rather than under the blue book. In so doing, Livingston-Graham was attempting to follow an industry practice which began about 1970. Under this practice, companies like Livingston-Graham which engaged in several operations would create or acquire a separate corporation with the exclusive operation of cement hauling. The new company would then enter into a for-hire agreement with the Union. The Teamsters, including Local 420, entered into a number of such for-hire agreements, in which the wage rates for drivers were substantially less than those under the blue book.[10]

In a letter dated July 27, 1975, Livingston-Graham informed Local 420 that it had established a cement hauling company called L-T Transport, Inc., and that it would like the Union to send it a cement hauling agreement. On July 15, 1975, Anton Dyck, who handles labor contract negotiations for Livingston-

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[10] The hourly pay rate for cement train drivers under the for-hire contract was $5.58 effective June 1, 1975; $5.98 effective July 1, 1975; and $6.20 effective January 2, 1976. In contrast, the blue book wage rate for cement train drivers was $7.73 effective September 1, 1974, with a 90- cent-an-hour increase September 1, 1975, and a 95-cent-an- hour increase effective September 1, 1976.

Graham and Tri-City, met with representatives from Locals 420 and 467 and said that he would like for both Locals to sign a for-hire agreement with the new company, L-T, to cover cement train drivers. This agreement would have resulted in all the cement trains staying where they were. The Livingston-Graham drivers would have had the option of transferring to L-T at the locations where they were then working, with retention of their Livingston-Graham seniority, or of refusing to transfer, and bumping into any slot that their seniority dictated, pursuant to the blue book. Tri-City drivers would have had a similar option.

However, the Local 420 representative told Dyck that the Union would sign the for-hire contract only if the affected drivers agreed to it. The Local 420 drivers requested the Union not to sign the agreement. Local 467, on the other hand, did sign the agreement on August 13, 1975. Subsequently, the 7 cement trains located at Livingston-Graham were moved to Tri-City, and 14 cement drivers, formerly employed by Tri-City, were hired by L-T. On January 2, 1976, L-T began operations. As a result of this action, three Livingston-Graham drivers were laid off and the remaining nine drivers bumped into different jobs with Livingston-Graham.

On January 24, 1976, the Livingston-Graham drivers filed a grievance under the blue book alleging that, without prior notice or bargaining, the Company violated the agreement "by virtually eliminating the work and classification of its Cement Train Drivers, and subcontracting (and/or otherwise transferring) said work to other employers and/or locations." On February 2, 1976, the Union filed a grievance form with the grievance committee alleging that Livingston-

Graham violated the seniority and job protection provisions of the blue book, Pursuant to the grievance procedure set forth in the contract, the grievance was heard by the joint grievance committee on February 19, 1976. The grievance was unanimously denied by the six members of the grievance committee. The Union apparently accepted the committee's decision, inasmuch as it did not file charges with the Board and there is no indication that it took any action to set aside the decision.

The complaint alleges that Livingston-Graham's actions constituted a partial abrogation of its agreement with Local 420 in violation of Section 8(a)(5) and that it transferred the the work in retaliation for Local 420's refusal to consent to a midterm modification of the agreement, thus violating Section 8(a)(3). In both instances, the question of whether a violation occurred can be answered only by determining whether the transfer of the cement trains was a mid-term, unilateral modification of the contract. Thus, the statutory rights involved herein are intertwined with an interpretation of the contract. The Administrative Law Judge so found, and we agree. He further found that such an interpretation can best be made by the grievance committee as part of the collective-bargaining process, that the decision of the committee met the standards set for in *Spielberg, supra,* and that deferral to the decision was therefore warranted. Accordingly, he dismissed the complaint. We agree with this conclusion.

Our colleagues' disagreement with the Administrative Law Judge's conclusion is based on two grounds. First, they hold that the decision of the grievance committee does not meet the *Spielberg* standards for

deferral. Second, they believe that the legality of Respondent's actions here does not depend on contract interpretation, and that the actions are unlawful under the statute. Neither of these positions is well founded.

With respect to the decision by the grievance committee, our colleagues assert that members of the committee have interests which are in direct conflict with those of the grieving party. They point to two of the management representatives, the retiring industrial relations director of the employer association and his successor, who, they argue, have conflicting interests because it is their function to act in the interest of the association members, many of whom have signed for-hire contracts of the sort at issue herein. They further argue that the third management representative had conflicting interests because he was from a company which had formed a for-hire cement company. No assertion is made that these representatives had a direct interest in affirming the specific for-hire contract at issue herein. In such circumstances, the majority position amounts to a rejection of any joint grievance committee as a body capable of impartially considering a grievance. For, as stated by the Administrative Law Judge, such committees, by their nature, cannot be entirely neutral. All representatives are involved in the same industry and are bound by the same contract. Any interpretation of the contract will necessarily interest them. Yet, as our colleagues acknowledge, the Board has held that decisions by joint labor-management committees can be treated as arbitration awards.[11] Our colleagues offer no evidence

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[11] *United Parcel Service, Inc.*, 232 NLRB 1114 (1977); *Terminal Transport Company, Inc.*, 185 NLRB 672 (1970); and *Denver-*

that the interests of the three management representatives are different from those of any other potential representative to the committee.

Nor is our colleagues' attack on the impartiality of the labor representative from Local 871 supported by the evidence. True, Local 871 signed a for-hire agreement with L-T. However, no cement trains have ever been within Local 871's jurisdiction. Four employees formerly represented by Local 871 did take employment with L-T as cement train drivers. Yet, when they attempted to transfer to L-T retaining the seniority earned under the contract between Local 871 and Tri-City, a grievance was filed, and it was decided that these employees could not maintain their seniority but would, instead, be treated as new employees for purposes of bidding and bumping rights. They all joined Local 467. THus Local 871 gained nothing for its members as a result of the transfer of work from Livingston-Graham to L-T. Its members, like those of any other union potentially a representative to the grievance committee, could leave their present jobs and begin work essentially as new employees at L-T where they would be represented by Local 467.

For these reasons, we see no merit in the majority's assertion that conflicting interests precluded an impartial decision by the grievance committee. We would, therefore, defer to the committee's decision determining that Livingston-Graham's transfer of cement trains to L-T did not violate the collective-bargaining agreement. Accordingly, we would find that Respondent did not violate Section 8(a)(5) by unilaterally modifying the contract, and therefore did

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Chicago Trucking Company, Inc., 132 NLRB 1416 (1961).

not violate Section 8(a)(3) by transferring work as a result of that modification.

Our colleagues, however, relying on an analysis of Respondent's conduct in light of statutory law rather than interpretation of the contract by the parties, find that the contract has been unilaterally modified. This finding is equally ill founded. Our colleagues correctly state that a unilateral removal of bargaining unit work during a contract term is an unlawful modification of the contract if the other party refuses to consent to the modification. They assert that Local 420 refused to consent to Respondent's proposed transfer of work and that Respondent therefore partially abrogated the contract by transferring the work. At the same time, they concede that the Union silently accepted the grievance committee's decision that Respondent did not partially abrogate the contract. Yet, clearly, since other alternative steps were available to it, if the Union accepted the decision in silence, it acquiesced therein and abandoned its earlier opposition to Respondent's action and consented to it.[12] Thus, our colleagues take the contradictory position that the Union both consented and refused to consent to the transfer of work. Small wonder that they find it "unnecessary" to

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[12] Our colleagues dispute this conclusion, arguing that the Union's failure to contest the decision is not tantamount to consenting to the actions of Respondent. But, by accepting the decision, the Union indicated compliance with it and therefore its assent. In these circumstances, for them to say there was no "consent" is reminiscent of the tale of the emperor who wore no clothes. In addition, the Union agreed in the collective-bargaining contract that questions about the contract would be settled by the joint committee. Thus, the Union consented to the joint committee's procedures herein and is bound by the joint committee's resolution.

pass on the allegation that Respondent violated Section 8(a)(5) by making a midterm, unilateral modification of the contract.

As a result of the inability to find a violation of Section 8(a)(5) and the failure to find evidence that Respondent's transfer of work was motivated by union animus, our colleagues are reduced to asserting merely that Respondent's action was "inherently destructive of employee interest," in violation of Section 8(a)(3). Yet, there is nothing inherently unlawful in an employer's securing lower wage rates for a certain type of work. It is a legitimate objective of the collective-bargaining process. The action is unlawful only in certain circumstances as when, for example, it is taken for the purpose of avoiding a bargaining obligation. Our colleagues assert that Respondent transferred the work for such a purpose. Once again, they are caught in a contradiction, for, if the Union consented to Respondent's action, as our colleagues concede, then the action was rendered lawful and we cannot find it was illegally taken for the purpose of avoiding the contract.

Accordingly, we cannot agree with any of our colleagues' conclusions. Assuming, *arguendo*, that their position on the invalidity of the grievance committee decision was correct, there still is no basis for finding a violation here. Irrespective of the impartiality of the committee decision, the Union clearly acquiesced in it. By so doing, it concurred in Respondent's transfer of the work. Thus, even if the transfer were a modification of the contract, it was consented to by the Union and was, therefore, not unlawful. For these reasons, we must dissent.

BROWN COMPANY; BROWN COMPANY, LIVINGSTON-GRAHAM DIVISION; BROWN COMPANY, TRI-CITY CONCRETE DIVISION; L-T TRANSPORT, INC.

DECISION

STATEMENT OF THE CASE

RICHARD D. TAPLITZ, Administrative Law Judge: This case was heard at Los Angeles, California, on October 19, 20, 21, 26, 27, and 28 and November 21, 1977. The charges in Cases 21-CA-14732-1 and 21-CA-14732-2 were filed by Kris A. Borum through her attorney, Neil Herring, on May 28, 1976. The complaint, which issued on February 23, 1977, and was amended at the hearing, alleges that Brown Company, herein called Brown; Brown Company, Livingston-Graham Division, herein called Livingston-Graham; Brown Company, Tri-City Concrete Division, herein called Tri-City; and L-T (the four entities are herein jointly referred to as Respondents), violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended. Prior to the opening of the hearing, the motion of Building Material & Dump Truck Drivers Local 420,. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called Local 420, to intervene was granted.

ISSUES

The primary issues are:

1. Whether Brown, Livingston-Graham, Tri-City, and L-T are so integrated as to constitute a single employer.

2. Whether Respondent violated Section 8(a)(5) of the Act by transferring certain Local 420 bargaining unit work (cement trains) from Livingston-Graham to L-T during the term of a contract that Livingston-Graham had with Local 420.

3. Whether Respondent violated Section 8(a)(3) of the Act by laying off or transferring to other classifications Livingston-Graham cement train drivers when the cement train work was removed from the bargaining unit.

4. Whether a grievance committee resolution of the dispute should be honored.

All parties were given full opportunity to participate, to produce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel, the Respondent, and the Charging Party.

Upon the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Brown is a Delaware corporation which, through its divisions, is engaged in the manufacture and transportation of rock, sand, gravel and ready-mix concrete products. Livingston-Graham is a division of Brown and is engaged in the manufacture and/or transportation of rock, sand, gravel and ready-mix products in Southern California from its yard located, until early 1976, at 5500 North Peck Road, El Monte, California, and thereafter at 13550 Live Oak Avenue, Irwindale, California. Tri-City is a division of Brown and/or Livingston-Graham and is engaged in the manufacture and/or transportation of rock, sand, gravel, and ready-mix products in Southern California. L-T is a California corporation wholly owned by Brown and is engaged in the transportation of bulk cement in Southern California. Tri-City and L-T share a principal business location at 8205 Alabama Street, Redlands, California. During the 12 months immediately preceding issuance of complaint, Brown, Livingston-Graham, and Tri-City each purchased and received goods and products valued in excess of $50,000 directly from suppliers located outside of California. During the same period of time the purchase and receipt of goods of each of the companies comprising Respondent from suppliers located outside of California if combined would exceed $50,000. Brown, Livingston-Graham, Tri-City, and L-T each is an employer engaged in commerce and in a business

affecting commerce within the meaning of Section 2(6) and (7) of the Act.[1]

II. THE LABOR ORGANIZATIONS INVOLVED

Local 420 is a labor organization within the meaning of Section 2(5) of the Act. General Truck Drivers, Warehousemen & Helpers Local 467, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called Local 467, is also a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Single Employer*

Anton Dyck is a corporate officer of Respondent. He is assistant secretary of Brown, vice president of Livingston-Graham and Tri-City, and treasurer and director of L-T. He reports to J. Watkins, who is general manager of Livingston-Graham and executive vice president of Livingston-Graham, Tri-City, and L-T. David Davis is director and president of L-T as well as senior vice president and director of Brown. James Mauer is director, vice president, and secretary of L-T and Brown, as well as counsel of Brown. Merrill Nash is a director of L-T, as well as a director and president of Brown. Donald Shields is assistant secretary of both

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[1] These findings are based on a stipulation of all parties.

L-T and Brown. Gary Tompkins is controller for Livingston-Graham, Tri-City, and L-T.

Dyck credibly testified and I find that Brown wholly owns and controls Livingston-Graham, Tri-City, and L-T. They are Brown's operating arms. Livingston-Graham and Tri-City are divisions of Brown, and L-T is wholly owned and controlled by Brown.

There is substantial functional integration between the companies. A large portion of L-T's operation involves delivering bulk cement to Livingston-Graham and Tri-City. L-T trucks are housed at Tri-City's yard and L-T uses Tri-City's office. A Livingston-Graham dispatcher dispatches L-T cement trucks. Livingston-Graham and Tri-City perform clerical work for L-T. L-T trucks are sometimes repaired at Livingston-Graham and Tri-City yards. Livingston-Graham and Tri-City share a common sales force. The companies do keep separate books and many of the services that one company performs for the other are paid for pursuant to written agreements.

Dyck is the key man in the labor relations policies of all of the companies. He handles labor contract negotiations for Livingston-Graham, Tri-City, and L-T. He is also in charge of the grievance procedures from the second step onward for those three companies. Local managers consult with Dyck when they want to discharge an employee and think that a grievance might result. Dyck has direct supervisory authority over employees of Livingston-Graham and Tri-City.

The facts set forth below show that the companies have a common labor policy with regard to the critical matters involved in the instant case. L-T was formed solely to implement Respondent's labor policy. Dyck

wanted to have Livingston-Graham and Tri-City cement trucks covered under one labor contract rather than another. L-T was created by Brown and purchased the Livingston-Graham and Tri-City cement trucks. L-T has those trucks at a Tri-City location so as to be covered by the contract it desired.

Separate corporations will be treated as a single employer for the purposes of the Act, where, despite nominal separation, they are highly integrated with respect to ownership and operation. Some of the principal factors considered are interrelation of operations, centralized control of labor relations, common management, and common ownership or control. *Radio and Television Broadcast Technicians Local Union 1264, IBEW v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255 (1965); *Sakrete of Northern California, Inc.*, 137 NLRB 1220 (1962), enf'd. 332 F.2d 902 (9th Cir. 1964), cert. denied 379 U.S. 961 (1965). In the instant case, Brown, Livingston-Graham, Tri-City, and L-T have common ownership, common officers, and common labor relations policies and the companies are functionally integrated. The corporate fiction does not prevent a finding that they are a single employer. *Insulated Building Materials Co., Inc.*, 162 NLRB 1105, 1109 (1967). I find that Brown, Livingston-Graham, Tri-City, and L-T constitute a single employer within the meaning of the Act.[2] *Pepe's Inwood Packing Co., Inc*p., 206 NLRB 642, 645 (1973).

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[2] Though I have found that the companies comprising Respondent constitute a single employer, that does not imply that the employees of each of the companies do not comprise separate appropriate bargaining units. *A-1 Fire Protection, Inc., and Corcoran Automatic Sprinklers, Inc.*, 233 NLRB 38 (1977).

B. *The Operations of Livingston-Graham and Tri-City Before the Advent of L-T*

L-T began operations on January 2, 1976. L-T was created solely for the purpose of operating cement trains that were formerly operated by Livingston-Graham and Tri-City.

A cement train consists of a tractor and two torpedo-shaped trailers in which bulk cement is carried. Cement is one of the ingredients of concrete. Bulk cement is carried in a cement train to a batch plant where it is mixed with rock, sand, and water. Those ingredients are mixed in a mixer truck and delivered as concrete. Respondent does not manufacture cement but buys it from companies not involved in this proceeding. Respondent is engaged in other aspects of the concrete business, including the transportation of bulk cement.

Livingston-Graham has been in existence since 1960. It employs between 400 and 500 employees and is engaged in the business of mining and selling rock and sand products and manufacturing and selling ready-mix concrete. It has 4 rock plants and 11 or 12 batch plants in Orange, Los Angeles, and Ventura Counties. Some 200 of Livingston-Graham's employees are represented by Local 420 under the terms of a contract between Rock Products and Ready Mixed Concrete Employers of Southern California and Locals 420, 692, 495, 88, 982, 235, and 871, Teamsters. That contract, which is referred to as the blue book, was effective from 1974 through August 31, 1977. A succeeding contract is still in effect. Livingston-Graham and Tri-City are each members of the Rock Products and Ready Mixed Concrete Employers of Southern

California. Much of Livingston-Graham's operation is within the jurisdiction of Local 420, and Livingston-Graham is, through its membership in the Association, bound by the blue book. The contract provides that the employer signatories thereto are "separate parties." It also refers to "the applicable Local Union." The recognition clause of the contract provides for a bargaining unit consisting of those classifications set forth in article IV, section I, of the contract and excluding all employees properly covered by other bargaining units. That article sets forth 29 different classifications for truckdrivers and employees engaged in related support functions. One of those classifications is that of "drivers of cement trains." The wage rate for that classification was $7.73 effective September 1, 1974, with a 90-cent-an-hour increase September 1, 1975, and a 95-cent-an-hour increase effective September 1, 1976.

Before L-T began operations on January 2, 1976, Livingston-Graham operated 7 trains and employed 12 cement train drivers.[3] One of the cement trains and two of the drivers were housed in Livingston-Graham's Vernon operation. Six cement trains and ten drivers were housed in Livingston-Graham's El Monte (also referred to as Irwindale) location. Both Vernon and El Monte are located within the jurisdiction of Local 420. All of Livingston-Graham's cement train drivers were members of Local 420 and were covered by the blue book.

Tri-City is engaged in substantially the same business as Livingston-Graham. It has several plants in San Bernardino and Riverside Counties and employs

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[3] Those 12 drivers are the alleged discriminatees.

about 100 employees. Tri-City's operations are located within the jurisdictional boundaries of Local 467 and Local 871, Teamsters. Some 50 or 55 of Tri-City's employees are covered under a contract with Local 467. Those operations that are within Local 871's jurisdiction are covered by an agreement between Tri-City and Local 871 that the terms of Local 467's contract are to govern. Before L-T began operations, Tri-City housed two cement trains and four cement train drivers at its Redlands location. Redlands is within the jurisdiction of Local 467, and none of the cement trains were housed within the jurisdiction of Local 871. The drivers were members of Local 467 and covered by a collective-bargaining agreement known as the orange book. The orange book is an agreement from 1974 through August 31, 1977 (which has been followed by a succeeding contract) between The Rock and Gravel and Ready-Mix Concrete Companies and Local 467. Tri-City is a signatory to that agreement.

When Livingston-Graham operated cement trains, they were used primarily as part of Livingston-Graham's own operation. In most cases the cement trains went to a cement plant, received a load and returned to a Livingston-Graham batch plant where the cement was mixed with rock, sand, and water. The concrete was mixed in Livingston-Graham's cement mixer trucks for delivery to Livingston-Graham customers. In such situations, the cement company, instead of using its own cement trains to deliver the cement to Livingston-Graham, credited the Livingston-Graham account with the cost of the Livingston-Graham cement train that was used. On such occasions, Livingston-Graham cement trains were not used for deliveries to Livingston-Graham. At such times, Livingston-Graham hired its cement trains to

the cement company, and the cement company used them to make deliveries to other customers. In such situations, the cement company paid Livingston-Graham for the use of the trucks at a rate set by the Public Utilities Commission. Livingston-Graham was supplying its cement trains "for hire" to the cement companies. All of the cement train work was covered under the blue book agreement with Local 420.

C. *The Evolution of Industry Practices With Regard to "For Hire" Contracts*

Historically, there have been two separate categories of employers who operate cement trains in the ready-mix concrete industry. In one category are the companies who are engaged in various aspects of the ready-mix business and who use their cement trains in hauling cement for their own needs. The various Teamsters unions seek blue book, orange book, or similar contracts from such companies. Before L-T took over Livingston-Graham's and Tri-City's cement train operations, Livingston-Graham and Tri-City were employers in this category. Livingston-Graham was bound by the blue book and Tri-City was bound by the orange book. The blue book set forth a payment schedule for cement train drivers.

The second category of companies is made up of those companies whose primary business is the hauling of bulk cement for cement companies on a "for hire" basis. Such companies do not haul their own products but in effect rent out their equipment and drivers to the cement companies for the cement companies to fill the needs of the cement company. The Teamsters unions within whose jurisdictions the for-hire companies are located seek to enter a special "For Hire Cement

Carriers Agreement" with such companies. The wage rate for cement train drivers under the for-hire agreement is substantially less than the wage rate under the blue book.

Companies such as Livingston-Graham worked under something of a competitive disadvantage under the blue book. Part of Livingston-Graham's work involved for-hire arrangements with cement companies for the use of its cement trains. Livingston-Graham was competing in that regard with companies who paid a lower wage rate under the for-hire contract.[4] The hourly pay rate for cement train drivers under the for-hire contract was $5.58 effective June 1, 1975. $5.98 effective July 1, 1975, and $6.20 effective January 2, 1976.

Beginning about 1970 a new practice began in the industry which made the situation of Livingston-Graham and comparable companies much worse. Companies in the industry who were signatory to the blue book, the orange book and equivalent contracts began to create or acquire separate corporations. The parent companyu would transfer its cement train operation to the new company and the new company would enter into a for-hire agreement with the Teamsters union in whose jurisdiction it operated. The new company would continue to perform the same work that the parent had previously done and carry cement needed by the parent. However, the new company's sole business would be operating the cement

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[4] Minimum rates for cement hauling are set by the Public Utilities Commission. The practice in the industry is to charge those minimum rates. The PUC considers the labor costs set forth in the for-hire agreement in determining rates.

trains and it would bill the cement companies for its services on a for-hire basis. While the parent had previously received a credit from the cement company against the purchase of cement, the new company would simply bill the cement company for service. Under this arrangement, the parent could have its own cement needs filled at a lesser cost because the new company would pay a lower wage rate to cement train drivers.

This pattern repeated itself over and over again.

One of the first to use the new system was Transit Mix Concrete, a company that is party to the blue book. A subsidiary, Foothill Transportation, entered into a for-hire agreement with Local 420. Succeeding for-hire contracts followed until the current one which is effective from 1976 through 1979.

G & E Ready Mix is another party to the blue book. It acquired a nonunion company named CTL Trucking, whose sole business was hauling cement for hire. G & E had a cement train with two drivers under the blue book. CTL bought the cement trains, and the drivers who had formerly driven them exercised their bumping rights and stayed with G & E. In February 1971, CTL entered into a for-hire agreement with Local 420 and Teamsters Local 692. That agreement was modeled on the Foothill agreement.

Sully-Miller is a party to the blue book. It wholly owns P & K Materials, Inc., a for-hire cement hauler.

G & T Cement Transportation, Inc., and Local 420 are parties to the for-hire agreement. G & T is a subsidiary of B & B Ready Mix Concrete, Inc. and B & B is a signatory to either the blue book or the orange book or both.

Sisk American Trucking is a party to a for-hire agreement with Local 420. Sisk is a subsidiary of the Skyline Concrete Sales Company. Skyline is a signatory to either the blue book or orange book or both.[5]

Steve Gibson is vice president and general manager of G & E Ready Mix. He sits on the negotiating committee that bargains for the for-hire contract. He credibly testified that there are 12 employees who are represented by that negotiating committee; that all of them are for-hire cement haulers; and that at least 9 of the 12 are related to ready-mix companies who are parties to the blue book. He also credibly testified that there are only some three ready-mix companies in the Southern California area who still operate cement trains under the terms of the blue book, and that, between those three companies, they operate only six or seven cement trains. He credibly estimated that those companies haul 2 percent or less of the total cement in that area.

Con Rock is engaged in the business of mining and transporting rock, sand, gravel and Ready-Mix products. At one time Con Rock employed 10 cement train drivers who operated cement trains under the blue book and the orange book, depending on the jurisdiction of the union in which the cement trains were housed. In 1973 or early 1974, Con Rock learned that there were several companies signatory to the blue book that had signed the for-hire cement agreement

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[5] The findings with regard to G & T Cement Transportation, Inc., and Sisk American Trucking are based on a stipulation relating to the 1976 contract. The record does not indicate whether that contract superseded a prior contract.

with Locals 420, 467, and 235. As those companies had a competitive advantage, Con Rock approached the various locals concerning the possibility of securing the same treatment. Con Rock acquired a dormant company which is named Reliance Transport Company. Reliance was wholly owned and controlled by Con Rock and the president of Con Rock was also the president of Reliance. Con Rock activated Reliance in early 1975 and negotiated with the various locals for a for-hire agreement. Locals 420, 467, 235, and 871 executed a for-hire contract with Reliance that was effective from June 1, 1975, to May 30, 1976. Two sheets were put on the back of the contract and the Con Rock cement train drivers could sign to indicate whether they wanted to drive for Reliance or stay with Con Rock. Two of the drivers chose to go with Reliance and eight opted to accept bumping rights within Con Rock.

Anton Dyck, who, among his other duties, is vice president of Livingston-Graham, learned that Reliance had entered into a for-hire contract shortly after it was signed. He called Arthur Battle, the manager of industrial relations for Con Rock (the parent of Reliance) and asked for details. Battle told him that he had set up a company called Reliance and had negotiated a for-hire agreement. Dyck asked for a copy of the contract and Battle sent him one.

Con Rock is a competitor of Livingston-Graham. When Dyck received a copy of the contract between Reliance and Local 420, he approached Local 420 with the request that Livingston-Graham be afforded equal treatment.

D. *The Transfer of the Cement Train Work From Livingston-Graham to L-T*

All of Livingston-Graham's 7 cement trains were housed in the jurisdiction of Local 420 (6 in El Monte and 1 in Vernon) and all 12 cement train drivers were covered by the blue book agreement between Livingston-Graham and Local 420. Dyck on behalf of Livingston-Graham sought out Oliver Traweek, secretary-treasurer of Local 420, in an attempt to work out an arrangement whereby the cement trains could operate under a for-hire contract rather than the blue book.

Dyck and Traweek are both members of a grievance committee under the blue book. Shortly before a grievance committee meeting on April 17, 1975, Dyck met with Traweek. Dyck said that his company was going to form a cement haul company and transfer the cement trrains to that company. He also told Traweek that he was aware that Traweek had signed the for-hire agreement with all of his company's competitors and that his company was the last one not under a for-hire agreement. Dyck said that he wanted to be competitive and that he wanted the same contract the Union had given everyone else. Traweek replied that Dyck's company was not the only one and Dyck asked who the others were. Traweek said that he did not know and that he would have to check his records. Traweek also said that they would discuss the matter further.

Sometime in April, May, or June 1975, L-T was formed. Dyck, who was instrumental in the creation of L-T, credibly testified that L-T was created in order to follow the industry practice of forming a separate company for the hauling of cement and to obtain a for-

hire cement train agreement that would allow the Company to pay lower wages to cement train drivers and be competitive with other companies.

After several telephone conversations between Dyck and Traweek in which the matter was discussed, Dyck sent Traweek a letter dated June 27, 1975, which stated:

> We had discussed, some time ago, that we would be setting up a cement hauling company called L-T Transport, Inc. This company is now set up and we would appreciate your sending us a Cement Hauler's Agreement such as the one recently executed by our competitors.
>
> If we need to get together for any reason on this matter, please let me know.

On July 15, 1975, Dyck met with Local 420 Secretary-Treasurer Traweek and Local 467 busines representative William Mann. Traweek represented Livingston-Graham's 10 cement train drivers housed in El Monte and two cement train drivers housed in Vernon. Mann represented Tri-City's four cement train drivers housed in Redlands. Dyck had retyped Reliance's for-hire contract and substituted L-T's name for Reliance's. He gave copies to Traweek and Mann.[6] He told them that he had copied the contract from the Reliance contract to which Locals 420 and 467 were parties, and that he would like them to sign the same contract with L-T. Mann said that the Reliance contract made some references to the blue

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[6] Traweek testified that he did not receive a copy of that contract until the following week. I credit Dyck's testimony to the contrary.

book rather than Local 467's orange book and he wanted that corrected. Dyck agreed. Traweek asked whether Dyck would red-circle wage rates and Dyck said he would not. The contract that Dyck brought did not have the last two pages on which drivers could sign whether they wanted to go with the new company or not. Traweek said that the Reliance contract had such pages for the drivers to sign and, in addition, the Reliance contract had a listing of the other locals. Traweek also said that it went smoother when the emnployees could indicate whether they wanted to stay with the old company or go with the new one and that it had worked well at Reliance. Dyck agreed to put the two pages on the back of the contract. Mann asked for a change in the pension plan language and Dyck agreed. They discussed who would type the contract and it was agreed that Dyck would do so. Traweek asked that there be a meeting with the drivers and said that it had worked well with Reliance when the people had a chance to sign for which company they wanted to work.

Traweek testified that at this and all other meetings he made it clear to Dyck that Local 420 would sign the for-hire contract only if the affected employees agreed to such a contract. Mann testified somewhat ambiguously but concluded that the understanding was that employee consent was needed. Dyck testified that there was a full and binding agreement on the for-hire contract and that, while Traweek never specifically said he would sign, they fully discussed the matter and reached an agreement. Dyck testified that he had no outstanding recollection that he was told at the July 15 meeting that the Union would sign the contract if the drivers agreed. He acknowledged, however, that he did give a sworn statement on a prior date in which he

averred that at that meeting Traweek told him that he would sign a contract if a majority of the drivers driving the cement trains agreed to it. I credit Traweek's assertion that his agreement to the for-hire contract was conditioned on approval by the drivers and no binding agreement was reached on July 15, 1975.

The agreement proposed by Dyck at the July 15 meeting would have resulted in all the cement trains remaining where they were. The Livingston-Graham drivers, all of whom were members of Local 420, would have had the option of transferring to L-T at the locations where they were then working, with retention of their Livingston-Graham seniority. They also would have had the option of refusing the transfer, remaining with Livingston-Graham and bumping into any slot that their seniority dictated pursuant to the blue book. In a similar vein, the Tri-City cement train drivers, all of whom were members of Local 467, would have remained at the same locations as employees of L-T with their Tri-City seniority or, at their option, bumped into available jobs at Tri-City under the orange book.

On July 24, 1975, Dyck met with 11 of the 12 Livingston-Graham cement train drivers in the conference room of the Livingston-Graham office. Traweek, as well as James Thompson, president of Local 420, was present. At the time Dyck was under the mistaken impression that Traweek had orally agreed to the for-hire contract. Dyck told the drivers that Livingston-Graham was going out of the cement hauling business and would no longer employ cement train drivers. He handed each of the employees a copy of the for-hire agreement. Annexed to the agreement were two pages for the employees to sign. One of them

read "We, the undersigned, have read and fully understand the provisions of the For Hire Cement Carriers Agreement and by affixing our signatures agree to be covered by this said agreement as employees of L-T Transport, Inc." The other page read: "We, the undersigned, have read and fully understand the provisions of the For Hire Cement Carriers Agreement and by affixing our signatures decline to be covered by this said agreement as employees of L-T Transport, Inc." Dyck told them that was the contract L-T would have and there were two pages at the end for the drivers to indicate whether they wanted to go with L-T or stay with Livingston-Graham. As Dyck assumed that Local 420 had agreed to the contract, he told the employees that they could go to L-T with their Livingston-Graham seniority or that they could stay with Livingston-Graham and bump into available jobs based on their seniority. It was understood that employees who remained with Livingston-Graham and did not have sufficient seniority to bump into an available job would be laid off.

Traweek, who understood that the choice of transferring to L-T with seniority would be available only if Local 420 agreed to the for-hire contract, told the employees that it would be for their benefit if the for-hire contract was signed and the cement trains were kept in the yard. He explained the bumping procedure and said that junior men would lose their jobs if the employees did not sign the for-hire contract. Thompson told the employees they should sign because it would keep the trains in El Monte, would save jobs and would keep the jobs in Local 420. Both of them gave reasons why the for-hire contract should be executed. Traweek told the employees that if the

Company did move the cement trains out of Local 420's jurisdiction and worked under another agreement or nonunion, the employees would not be able to go along with the trucks and that they would have to bump in compliance with the blue book seniority procedure. He explained the pension benefits that might be lost. He also told them that he would not sign the agreement until the members involved authorized him to do so.

One of the drivers asked for another meeting so that they could have time to read the contract before making a decision. Another meeting was scheduled for July 31, 1975.[7]

On July 30, 1975, the day before Dyck's second meeting with the Local 420 drivers was scheduled, Dyck met with Local 467 representatives and the drivers of the two cement trains that were housed at Tri-City. Local 467 Business Representative Mann and Shop Steward Wilson were present. Dyck told the employees about the formation of L-T and the proposed transfer of the cement trains to L-T. He explained the situation and gave them copies of the for-hire contract. At that meeting, Local 467 agreed to sign the for-hire contract. On August 13, 1975, L-T and Local 467 executed that agreement.[8] The agreement

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[7] Some of the employees testified that other things were said at the June 24, 1975 meeting, but it appears that they were confused with regard to what was said at the June 24 and the July 31 meetins.

[8] The contract by its terms was to be in effect through June 30, 1976. On January 2, 1976, a new contract was entered into, which incorporated some changes that had been negotiated in the dispatch procedure. The August 13 agreement named both Local 467 and Local 420 as parties. Local 420 did not execute the

provided that Tri-City cement train drivers who were assigned to and regularly driving equipment transferred to L-T would have first priority to transfer with such equipment into the employ of L-T with their Tri-City seniority date but with the wages and benefits provided in the for-hire contract. It was anticipated that Tri-City's two cement trains, after being transferred to L-T, would remain at Tri-City's Redlands yard and be driven by the former Tri-City cement train drivers. In the event that a Tri-City driver did not desire to work for L-T, that driver would be given the option of bumping back into Tri-City in whatever position his seniority dictated.

Dyck met with the Livingston-Graham cement train drivers again on July 31, 1975. Traweek was not present but Local 420's president, Thompson, was. Much of what was said at the July 24 meeting was repeated. In addition, there were a number of questions from employees concerning such matters as pension rights. Thompson told the employees that it was in the employees' best interest to sign the for-hire agreement. Dyck asked them to sign one of the two sheets at the back of the contract to indicate whether they wanted to work for L-T or exercise bumping rights at Livingston-Graham. Some of the employees said they would sign, others said they would not, and still others said they would sign under protest. Dyck told them they had until August 11 to make a final determination.[9]

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agreement and therefore it did not apply to Local 420.

[9] Dyck credibly testified that at that time he believed that, by August 11, the Public Utilities Commission would allow the transfer of Livingston-Graham's cement haul permit to L-T. In fact, the permit was not transferred until December 1975 and, because of that, L-T did not begin operations until January 2,

Sometime after the July 31 meeting, Traweek held a meeting with the Livingston-Graham train drivers. He told the employees that if Local 420 signed the for-hire agreement, the cement trains would stay where they were and that the employees would work for L-T with their Livingston-Graham seniority. He also told them, in substance, that if Local 420 did not sign the agreement, the cement trains would be taken out of Local 420's jurisdiction and that the employees would lose out. A vote was taken and the employees requested Traweek not to sign the for-hire agreement.

On August 11, 1975, Traweek called Dyck and told him that Local 420 would not sign the agreement. On that day, Dyck made the decision that the Livingston-Graham cement trains would be relocated to Redlands. Dyck acknowledged in his testimony that, if Traweek had agreed to sign the agreement, the cement trains would have remained where they were and that the Livingston-Graham drivers would have had an opportunity to transfer to L-T with their seniority.

Shortly after the August 11 conversation between Traweek and Dyck, Dyck called Local 467 Business Representative William Mann. Mann had already agreed to sign a for-hire contract with L-T. Dyck told Mann that Local 420 was not going to sign the for-hire agreement. He also told Mann that he anticipated bringing the cement trains that were then in Local 420's jurisdiction into Local 467's area, and he asked Mann whether Mann would agree to it. Mann replied that he would have to check with Local 420. Mann then called Traweek and told him of the conversation with Dyck. Traweek said that his people were not

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1976.

going to go along with the for-hire agreement. Mann asked whether it was all right if Local 467 signed. Traweek replied that he could not keep Local 467 from signing and that he did not see any way he could keep the Company from doing what it wanted to with its equipment.

On August 13, 1975, Local 467 and L-T signed a for-hire agreement. The agreement named both Locals 467 and 420 but, as Local 420 did not execute the agreement, it did not apply to it. The agreement had detailed procedures for hiring at L-T. It provided in part that cement train drivers who formerly worked for Tri-City would have first priority to transfer with the equipment into the employ of L-T with their Tri-City seniority, but at the wage and benefit levels contained in the for-hire agreement. The contract also provided that, as to any equipment initially remaining unassigned, L-T would call Local 467 for references of qualified individuals before filling the vacancies, with the selction of any new hire being within the sole discretion of L-T.

By memo dated August 20, 1975, the Tri-City employees were notified that all the bulk cement trains would be parked at the Redlands facility and that any teamsters employed at Tri-City would have a one-time opportunity to transfer into the new company without any loss of seniority. The memo invited employees to apply and a number of them did so. In September, the L-T jobs were promised to applicants from Tri-City employees and everyone who had been promised the job, except for one or two who changed their minds, began work when L-T went into operation on January 2, 1976. A total of 14 L-T cement train drivers were initially hired for 9 cement trains. At least one of

the employees had previously driven a cement train for Tri-City and all of them had previously worked for Tri-City in one capacity or another. Some of the Tri-City employees who had been cement train drivers opted to bump back into Tri-City and not accept the work with L-T.

In early November 1975, Local 871 signed a for-hire contract with L-T. Local 871 had jurisdiction over Tri-City's rock and batch plants in Upland, California, but no cement trains had ever been based there. As of the date of the trial, there still were no cement trains based within Local 871's jurisdiction. Local 871's for-hire contract with L-T would become meaningful only if cement trains were domiciled within its jurisdiction. However, under the terms of that contract, an argument could be made that Tri-City employees within Local 871's jurisdiction could transfer to L-T with their Tri-City seniority, even though the Local 871 contract did not cover the geographical area in which L-T's cement trains were housed. After L-T's initial hiring, four of the Local 871 employees went to work for L-T with their Tri-City seniority. They all joined Local 467. A grievance was filed on the seniority issue and, undisputed contractual grievance procedure. It was decided that those employees could not maintain their Tri-City seniority and would be treated as new employees.

In a letter to Local 420, dated December 30, 1975, Livingston-Graham stated that the equipment it had used in cement hauling had been acquired by L-T and that Livingston-Graham would no longer employ cement haul drivers.[10]

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[10] The letter stated:

On December 31, 1975, all of the Livingston-Graham cement trains were physically moved to Tri-City's Redlands yard. On January 2, 1976, L-T began its cement hauling operation from Tri-City's Redlands yard with the former Tri-City employees who had been promised jobs with L-T.[11]

Before L-T began operations, Livingston-Graham employed 12 cement train drivers. They were Kris A Borum, Anthony Giangreco, James A. Wilson, William R. Cannon, Louis H. Bering, Harry D. Potts, Carmen Rosselli, Robert L. Reilly, Robert L. Shaffer, Donald N. Thomas, Clarence Hudson, and James Jaworski. On January 2, 1976, Dyck told the employees in the presence of representatives of Local 420 that Livingston-Graham had no more cement train work and that the employees would have to exercise their

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> We are, by this letter, confirming the previous notice to your organization and its members that because of economic reasons this company is going out of the business of cement hauling and will not employ any drivers for that purpose. In conversations with representatives of your organization, we communicated the fact that this would occur not later than the end of the calendar year 1975. We have not been able, in a number of meetings with you, to reach agreement concerning the effect of this discontinuance of business upon those of your members that were employed by us in the operation of the equipment used in the hauling of cement.
>
> The equipment that was used in the cement hauling has been acquired by L-T Transport, Inc., which is in the business of transportation of bulk cement.

[11] At a special meeting of the L-T board of directors on December 30, 1975, the acquisition of Livingston-Graham equipment was authorized. L-T purchased cement trains from Livingston-Graham and from Tri-City through the parent Brown. Brown purchased them and sold them to L-T.

seniority rights for bumping. Borum, Jawarski, and Hudson did not have enough seniority to bump into any other position and they were laid off on that day. The other nine employees bumped into different jobs with Livingston-Graham. Some of those jobs involved less overtime than the employees had previously made and some were to jobs that the employees did not consider desirable. About 4 months later, the three laid-off employees were recalled and given non-cement train driver work.

The complaint does not allege that L-T violated the Act by its hiring procedures. The General Counsel stated on the record that the complaint was not intended to attack the hiring procedure or practice or the hiring that was actually done by L-T when it began its cement train operation. The General Counsel also stated:

> What we're alleging is that there was a violation when these trains were sent down there; that the trains should go back *status quo ante* and the cement train drivers who were driving the trains for Livingston-Graham at that time should be reinstated as the cement train drivers.
>
> But we are not alleging any violation as to the hiring under the [L-T "for hire"] contract because we're not attacking the contract.

The General Counsel took the position that he ws not contending that Respondent refused to bargain by failing either to transfer cement train drivers to L-T under the for-hire agreement or to directly hire the cement train drivers at L-T under the for-hire agreement.

Livingston-Graham employee Schaffer testified that he asked Dyck if any of the employees would be allowed to go with the cement trains to Redlands if and when they were moved, and that Dyck replied that, if he let one employee go, he would have to give the same opportunity to the others, so it would be company policy to allow no one to go. Dyck testified that all he told Schaffer was that if Schaffer wanted to work for L-T, he would have to go as a brand new hire because the jurisdiction between the two locals would not honor the seniority. I credit Dyck's version of the conversation. Dyck also credibly testified that he never told any cement train driver that that driver could not apply for work at L-T. After the cement trains were moved, Schaffer asked Dyck if he could transfer to Redlands. Dyck replied that Schaffer could apply at Redlands and that, if he needed a recommendation, he (Dyck) would probably give him one.

From time to time before the formation of L-T, Livingston-Graham transferred equipment to Tri-City, removing it from Local 420's jurisdiction. Livingston-Graham drivers were not permitted to follow the equipment and could only apply for work at Tri-City as new employees. That procedure was followed whenever equipment was transferred from a location where it was covered by one collective-bargaining contract to a location where it was covered by a different collective-bargaining contract.

E. *The Grievances Filed by the Livingston-Graham Cement Train Drivers*

1. The grievance procedure under the blue book

As is set forth above, the blue book is a collective-bargaining agreement between a number of employers through the Rock Products and Ready Mixed Concrete Employers of Southern California and Teamsters Locals 420, 692, 495, 88, 982, 235, and 871. The blue book contains a three-step grievance procedure. In the first step an employee can take up a grievance with his foreman, shop steward, or union representative. With regard to the second step, the blue book provides:

> Article XI
>
> GRIEVANCE PROCEDURE
>
> Section 1. Grievance Steps. Grievances shall be taken up and processed in the following manner:
>
> . . .
>
> (b) STEP TWO. If the grievance is not settled in Step One within two (2) working days, within ten (10) working days thereafter it shall be presented in writing through the Union to the Employer and the Employers' Negotiating Committee; provided, however, that grievances may be initiated by the Union directly in this Step Two. A Committee of an equal number of representatives of the Employers' Negotiating Committee and the

> Union will meet within thirty (30) working days thereafter to settle the grievance. This Committee is authorized to adopt written rules of procedure by mutual agreement and such rules of procedure shall be binding upon all signatories to this Agreement. If a decision is reached by this committee, it shall be final and binding upon all parties involved.

The third step, which provides for the appointment of an arbitrator, is applicable only if the grievance is not resolved at the second step. The grievance committee's contractual mandate is broader than that of the third step arbitrator. The third step procedure states:

> The power and authority of the arbitrator shall be limited to the question presented to him, and he shall have no power to add to or subtract from or modify any terms of this Agreement. . . .

The blue book also provides as follows:

Article XIII

BARGAINING

> Section 1. Interpretation of Agreement. Questions concerning interpretation or application of this Agreement may arise from time to time and in the interest of preventing misunderstandings, an equal number but not less than three (3) each from the Employers' Negotiating Committee and the Union Negotiating Committee shall promptly meet at the request of either in an attempt to resolve such question, but in any event within

thirty (30) days, unless otherwise mutually extended.

Under the rules of procedure established by the grievance committee, there is a chairman of the employer-members of the association and a chairman of the union members. Prior to each hearing, the employer and the union chairmen each designate three members of the panel who decide the particular case. The chairmen alternate in presiding over the hearings but they do not participate in the vote. The rules of the committee provide that a tape recording shall be taken of the proceedings and kept for 3 years. However, the record is unclear as to whether tape recordings were taken at the time the grievances in question were heard. Traweek testified that tape recordings were kept only when there was disagreement within the grievance committee and the grievance had to go to the third step. In any event, there appears to be no tape available relating to the instant case. The decision of a majority of the grievance committee is final and binding. If the grievance committee is evenly split, the matter can go to the third step of the grievance procedure.

An official minute is made relating to each grievance hearing. In addition, the association prepares a more detailed minute which it distributes to its members. The association's minute is unofficial and the Unions are not parties to it.

2. The grievances

On August 1, 1975, a grievance was filed by employees. The grievance protested an anticipatory breach of contract. Local 420 filled out a grievance form dated August 6, 1975, which was presented to the

grievance committee. The grievance protested the eliminating of cement trains. At the time of the grievance hearing on August 21, 1975, Livingston-Graham was still operating the cement trains. The grievance committee decided that there was no violation of the collective-bargaining agreement.

L-T began operations on January 2, 1976, and on that date the Livingston-Graham cement train drivers either bumped into different positions or were laid off. On January 24, 1975, the cement train drivers filed a grievance which stated:

> On or about January 2, 1976, without prior notice or bargaining with the Union, Livingston-Graham, Inc., violated the 9/1/74-8/31/77 Rock Products and Ready-Mixed Concrete Employers of Southern California collective agreement, by virtually eliminating the work and classification of its Cement Tain Drivers, and subcontracting (and/or otherwise transferring) said work to other employers and/or locations.,

The grievance was signed by Kris Borum and James A. Wilson.

A grievance form dated February 2, 1976 was filed by the Union with the grievance committee. It alleged that Livingston-Graham violated articles X and XIX of the agreement. Article X of the contract provides for seniority rights. Article XIX, which is entitled "Job Protection," provides as follows:

> It is the intent of the parties to this Agreement to protect the work performed by employees in the bargaining unit.
>
> The Employer recognizes that it is important and desirable to utilize its own equipment

and drivers to the greatest extent possible prior to using sub-haulers and/or non-Company trucks.

The Union recognizes that under certain conditions, such as those dictated by customer demands, equipment requirements, daily dispatch determinations, materials to be hauled and similar factors, that sub-haulers and/or non-Company trucks are necessary and have been so utilized throughout the Industry for many years.

The Union recognizes that under certain conditions, such as those dictated by customer demands, equipment requirements, daily dispatch determinations, materials to be hauled and similar factors, that sub-haulers and/or non-Company trucks are necessary and have been so utilized throughout the Industry for many years.

The Employer, in accordance with the above, must, however, determine the number, type and location of its working equipment in conformity with its business requirements. The Employer further must be able to determine, in keeping with sound business practices, the extent to which it will replace equipment which is too costly to operate, obsolete or damaged.

Under these conditions, the Employer agrees that sub-haulers and/or non-Company trucks will not be utilized as a subterfuge to defeat the protection of the bargaining unit work.

> In keeping with the above, the Union recognizes that the Employer will utilize such sub-haulers and/or non-Company trucks as required by location and classification only after all the available Company trucks at such locations and in similar classifications have been initially dispatched.

The grievance was heard by the grievance committee on February 29, 1976. Traweek was presiding cochairman at that time. He did not participate in the deliberations or the vote. The union representatives on the grievance committee were Rafferty of Local 235, Lee of Local 692, and Musser of Local 871. The company representatives were Clemente of Sully-Miller Contracting Company, Munson, the retiring industrial relations director for the Association, and Samson, his successor. Local 420 business representative, Tanberg, partially presented the case for the grievants. Before the commencement of the hearing, Neil Herring requested to appear and represent the grieving employees. He was told by Cochairman Traweek that attorneys were not able to represent either side before the grievance committee and Herring was required to leave.

Tanberg began to present the union case. Grievant Borum interrupted and said that she had not been fairly represented by Tanberg and desired to present her own case. The grievance committee decided that she could go ahead and present her own case. She read article 1, section 1, dealing with union recognition and argued that the Company had violated that part of the contract by failing to negotiate over the movement of equipment to the other company. She pointed to article IV of the contract which deals with wages and argued

that the Company had violated the agreement by not paying the proper rate for the equipment when it moved its trucks to the other company. In addition, she mentioned article XIX of the contract which deals with job protection and argued that Livingston-Graham sold the equipment to L-T in violation of the job protection clause; that it was a paper transfer of equipment; that the two companies were related; and that there was a violation relating to the bargaining unit that she belonged to. She also argued that there was a violation of article XX, which deals with the term of the contract.

Anton Dyck presented Livingston-Graham's case. He argued that Livingston-Graham could not compete with the cement haul companies and that it was uneconomical for Livingston-Graham to continue with those trucks. He told the committee that Livingston-Graham sold its trucks to L-T and negotiated an agreement in good faith with another local. He pointed out that Livingston-Graham had unsuccessfully attempted to negotiate an agreement with Local 420 and that the Company had the right under the job protection clause to sell the equipment.

After the presentation, the grievance committee deliberated in executive session. They voted to deny the grievance. John Clemente, who was a member of the grievance committee, credibly testified that he believed the six members of that committee were unanimous in their decision. On his notes of that meeting he wrote: "case of Union denied, motion carried unanimous." The only official written documentation of that decision is a minute that states "Moved and seconded claim of union be denied. Carried." The minutes of the

meeting prepared by the Association and distributed to its members read:

> *Case 2-6-13—Local 420 vs. Livingston-Graham*
>
> *Dispute:*
>
> Kris Brown and James Wilson protest the Company's disposal of the Cement Trains.
>
> *Contract Reference:* Article X. Section 3 and Article XIX
>
> *Summary of Facts:*
>
> The union alleged that on January 2, 1976, the Company, without prior notice or bargaining, violated the Labor Agreement by eliminating work in the Cement Trains classification. The Company related that they had sold the Cement Trains because they could no longer competitively haul their own cement. The equipment was sold to L.T. Transportation, who negotiated in good faith with another Local Union and successfully bargained an Agreement with that Local. They attempted to negotiate a similar Agreement with Local 420 but when Local 420 refused to sign, the equipment was all moved to the jurisdiction of the Local which had signed an Agreement with L.T. Transportation.
>
> *Decision:*
>
> Motion made and seconded that the claim of the Union be denied. Motion Carried.

F. *Analysis and Conclusions*

Respondent is a single employer consisting of Brown, Livingston-Graham, Tri-City, and L-T. The

different corporate arms of Respondent have separate collective-bargaining units. Livingston-Graham employed some 200 employees in a collective-bargaining unit covered by the blue book. The blue book is a contract between the member employers of the Rock Products and Ready-Mix Concrete Employers of Southern California Association (including association member Livingston-Graham) and seven Teamsters locals, including Local 420. On December 31, 1975, Respondent transferred seven pieces of equipment known as cement trains from Livingston-Graham's El Monte and Vernon yards to L-T's Redlands yard. The 12 Livingston-Graham cement train drivers who had operated that equipment were within the collective-bargaining unit covered by the blue book. As a result of that transfer, Livingston-Graham had no further need for cement train drivers. Nine of those drivers bumped into other positions with Livingston-Graham and the three others were temporarily laid off until positions with Livingston-Graham opened to which the drivers could assert their seniority bumping rights. The complaint alleges that Respondent's actions constituted a partial abrogation of the collective-bargaining agreement in violation of the Act.

As the Board held in *C & S Industries, Inc.*, 158 NLRB 454, 458 (1966):

> While it is true that a breach of contract is not *ipso facto* an unfair labor practice,[7] it does not follow from this that where given conduct is of a kind otherwise condemned by the Act, it must be ruled out as an unfair labor practice simply because it happens also to be a breach of contract. Of course, the breadth of Section 8(d) is not such as to make any default in a

> contract obligation an unfair labor practice, for that section, to the extent relevant here, is in terms confined to the "modification" or "termination" of a contract. But there can be little doubt that where an employer unilaterally effects a change which has a continuing impact on a basic term or condition of employment, wages for example, more is involved than just a simple default in a contractual obligation. Such a change manifestly constitutes a "modification" within the meaning of Section 8(d). And if not made in compliance with the requirements of that section, it violates a statutory duty the redress of which becomes a matter of concern to the Board.
>
> [7] *Wilson & Co., Inc.*, 89 NLRB 310; *American Vitrified Products Company*, 127 NLRB 701.

The Board has held that unilateral removal of bargaining unit work during a contract term is the type of contract modification proscribed by the Act. *The Boeing Company*, 230 NLRB 696 (1977). Economic justification is not a defense to such a violation. *Oak Cliff-Golman Baking Company*, 207 NLRB 1063 (1973). In *The University of Chicago*, 210 NLRB 190 (1974), enforcement denied 514 F.2d 942 (7th Cir. 1975), the Board held that a company violated Section 8(a)(5) and (2) of the Act by transferring work from employees in one bargaining unit to employees in another bargaining unit at the same location. However, the Board made clear that a *per se* approach should be avoided and that all factors should be considered, holding:

> We are not here holding that the recognition clause of a contract and the workplace

practices underlying it absolutely bar an employer's removing work embodied in the contract classifications from a particular union's unit during the contract term. It is well established that an employer may, after the necessary bargaining, terminate work done by the union's members at a particular location and subcontract it,[4] transfer it elsewhere,[5] or introduce different methods of operations as the same location,[6] even though such action is taken during the contract term and results in the elimination or reduction or reduction in size of the unit involved. Notwithstanding these results, such action is permitted as an accommodation to management's responsibility for determining the allocation of the firm's capital investment[7].

. . .

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[4] Cf., e.g., *Florida Texas Freight, Inc.*, 203 NLRB 509; *Howmet Corporation*, 197 NLRB 471.

[5] Cf., e.g., *American Needle & Novelty Company*, 206 NLRB 532; *Weltronic Company*, 173 NLRB 235.

[6] Cf., e.g., *Atlantic Daily World*, 192 NLRB 159.

[7] As the Board noted in *American Needle, supra*, it is the extent to which the decision to subcontract or relocate work involves "a significant investment or withdrawal of capital affecting the scope and ultimate direction of the enterprise" that determines whether management is obligated to bargain about the decision itself. The effects of such decision on the unit involved must, of course, normally be bargained about.

The pivotal question in this case is whether Respondent's transfer of the cement train work from Livingston-Graham to L-T constituted a modification

of the blue book or simply an action permitted by the blue book. If the action was a permitted one, there can be no finding that Respondent unilaterally modified the contract in violation of Section 8(a)(5) of the Act. The threshold question is therefore one of contractual interpretation.

The complaint alleges that the work was transferred in retaliation for Local 420's refusal to consent to a midterm modification and that Respondent violated Section 8(a)(3) of the Act by laying off the 12 employees from their cement train driver jobs in retaliation for Local 420's refusal to assent to such modification. The evidence does not support such a "retaliation" theory. Respondent acknowledges that it desired to have the cement train work done under the for-hire agreement, rather than the blue book, and that it set up L-T to do such work. However, Respondent also made every effort to keep the work within Local 420's jurisdiction, to keep the cement trains housed where they always had been, and to use the Livingston-Graham cement train drivers to perform the work for L-T. Livingston-Graham consistently urged Local 420 to execute the for-hire agreement. The employees involved would not permit Local 420 to execute the for-hire agreement and Respondent transferred the cement trains to Redlands. The transfer was in conformity with industry practice and was undertaken solely for economic reasons. The General Counsel has not established that Livingston-Graham harbored any animus toward Local 420 or the Livingston-Graham cement train drivers, and there is no basis for a finding that Respondent's actions were in retaliation for Local 420's refusal to agree to a midterm modification. If Respondent had the contractual right to move the jobs from Livingston-Graham to L-T, there could be no

finding that Respondent violated Section 8(a)(3) of the Act. If, on the other hand, the transfer was a unilateral midterm modification in violation of Section 8(a)(5) of the Act, then a Section 8(a)(3) violation might be argued on a derivative theory. Cf. *Helrose Bindery, Inc. and Graphic Arts Finishing, Inc.*, 204 NLRB 499, 504 (1973). The core question remains one of contract interpretation.

The decision of the United States Supreme Court in *United Steelworkers of America's v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-580 (1960), gives guidance in the interpretation of collective-bargaining agreements. The Court held:

> The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. See Shulman, Reason, Contract, and Law in Labor Relations, 68 Harv. L. Rev. 999, 1004-1005. The collective agreement covers the whole employment relationship. It calls into being a new common law — the common law of a particular industry or of a particular plant. As one observer has put it:
>
> " . . . [I]t is not unqualifiedly true that a collective-bargaining agreement is simply a document by which the union and employees have imposed upon management limited, express restrictions of its otherwise absolute right to manage the enterprise, so that an employee's claim must fail unless he can point to a specific contract provision upon which the claim is founded. There are too many

people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. We must assume that intelligent negotiators acknowledged so plain a need unless they stated a contrary rule in plain words."

The mature labor agreement may attempt to regulate all aspects of the complicated relationship, from the most crucial to the most minute over an extended period of time. Because of the compulsion to reach agreement and the breadth of the matters covered, as well as the need for a fairly concise and readable instrument, the product of negotiations (the written document) is, in the words of the late Dean Shulman, "a compilation of diverse provisions; some provide objective criteria almost automatically applicable; some provide more or less specific standards which require reason and judgment in their application; and some do little more than leave problems to future consideration with an expression of hope and good faith." Shulman, *supra*, at 1005. Gaps may be left to be filled in by reference to the practices of the particular

> industry and of the various shops covered by the agreement. . . .

When a collective-bargaining agreement is viewed in that context, it is clear that the parties to the contract are in a better position than anyone else to interpret their own contract. Such interpretation can be part of the collective-bargaining process. The statutory policy is clearly enunciated in Section 203(d) of the Act, which states:

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. . . .

See also *Gateway Coal Co. v. United Mineworkers of America*, 414 U.S. 368, 377 (1974).

In the instant case, the parties to the blue book have provided for a three-step grievance procedure. Under the second step of that procedure, three representatives of the employer's negotiating committee and three representatives of the Unions attempt to resolve grievances. There is no neutral party. If the Employer's representatives and the Union's representatives cannot agree on the resolution of a particular grievance, that grievance goes to the third step, under which an arbitrator makes the decision. If the representatives of the Employers and the Unions come to an agreement, that agreement is binding. As is discussed in more detail below, a binding decision by the grievance committee can be treated by the Board as an arbitral determination of the dispute. However, the grievance committee has other aspects as well. Under the contract, the parties are represented by their

respective grievance committee members. All grievance proceedings are extensions of the collective-bargaining procedure. However, in situations such as this, the representatives of the parties on the grievance committee very literally continue the bargaining process.[12] The members of the grievance committee are in a uniquely favorable position to deal with grievances in the context of a continuing bargaining relationship. They are personally involved in the industry and can use their knowledge of industry practices and the law of the shop to interpret contract provisions. Both the Employers and the Unions have delegated to their respective representatives power to bind them with regard to the interpretation of the contract. When a majority of the representatives of the Employers and the Unions agree to the resolution of a dispute, that dispute is ended. Only where a majority cannot agree can the third step of the grievance procedure be invoked.

Article XIX of the blue book, entitled "Job Protection," the text of which is set forth above, deals in part with the use by the Employer of noncompany trucks and the right of the Employer to determine the number, type, and location of its working equipment. There is a serious question whether that clause contemplates the transfer of trucks out of the bargaining unit, but an argument to that effect can be made. In the past, Livingston-Graham has transferred equipment to locations outside the jurisdiction of the

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[12] Indeed, under art. XIII of the blue book, which is entitled "Bargaining," members of the Employer's negotiating committee and the Union's negotiating committee are authorized to meet to attempt to resolve questions concerning the interpretation of the agreement.

blue book and there is no indication that Local 420 has protested such transfers. In addition, industry practices which have evolved over the years and which are described in detail above have to be considered. Local 420 and the other unions under the blue book have permitted Respondent's competitors to set up setellite corporations for the purpose of performing cement train work under the for-hire agreement.

A majority of the grievance committee, which consisted of both the Employer's and the Union's representatives, agreed that Respondent's actions in transferring the equipment from Livingston-Graham to L-T and the consequent loss of work to the bargaining unit did not violate the contract. Local 420 is bound by the grievance committee's decision and, in effect, Local 420 has agreed through its representatives on the grievance committee that Respondent has not violated the contract. It appears that Local 420 has accepted the situation in that it has not filed charges with the Board and there is no indication that it has taken any action to set aside the committee's decision. Cf. *A-1 Fire Protection, Inc.*, 233 NLRB 38 (1977). As both Respondent and Local 420 have in effect agreed through their representatives that the contract has not been violated, the dispute has been resolved and a finding that Respondent has unilaterally partially abridged the contract is not warranted. I find that Respondent has not violated the Act as alleged in the complaint.

In reaching this conclusion, it is noted that the complaint alleges a refusal to bargain with the Union. The central issue in both the grievance and the unfair labor practice case is whether Respondent violated the contract by removing equipment and work from the

bargaining unit. The Union is the representative of the employees in questions of that nature. There is no allegation in the complaint that the Union unfairly represented the employees, and there is no showing that there is a conflict of interest between the employees and Local 420 that would preclude Local 420 from representing them.[13]

Even if the decision of the grievance committee is viewed as an arbitral determination of the dispute rather than a negotiated agreement by the representatives of the parties to the contract, the complaint must be dismissed.

In *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955), the Board held that it would defer to an arbitration award where "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not

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[13] The employees filed one unfair representation charge against Local 420 on August 12, 1975, in Case 21-CB-5383, and another on May 28, 1976, in Case 21-CB-5697. Both charges were dismissed by the Regional Director for Region 21. Civil proceedings in Los Angeles Superior Court in Case C-157166 are pending in cases brought by the employees against both Respondent and Local 420. By finding that Local 420, through its representatives, agreed that Respondent had not violated the contract, I am not implying that Local 420 failed in its duty to fairly represent the employees. In *Ford Motor Co. v. Huffman*, 345 U.S. 330 at 338 (1953), the United States Supreme Court discussed a union's duty of fair representation, saying:

> A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Nothing in this Decision is intended to imply that Local 420 lacked "complete good faith and honesty of purpose."

clearly repugnant to the purposes and policies of the Act." In cases following *Spielberg*, the Board has held that the arbitral process is not a proper substitute for Board determination in certain types of cases. See *Croatian Fraternal Union of America*, 232 NLRB 1070 (1977). However, where the key issue in a case is one of contractual interpretation, the arbitral process is particularly appropriate for the resolution of the dispute.

Roy Robinson, Inc. d/b/a Roy Robinson Chevrolet, 228 NLRB 828 (1977), was a case involving prearbitration deferral under *Collyer Insulated Wire, A Gulf and Western Systems Co.*, 192 NLRB 837 (1971), rather than a postarbitration deferral under *Spielberg*. However, much of the rationale in *Roy Robinson*, the complaint alleged that a company violated Section 8(a)(5) and (1) of the Act by closing its body shop and discharging certain employees without notice to or bargaining with the union. The contract provided that the employer should have the exclusive right to discharge employees. There was a contract provision entitled " . . . Sub-Contracting," but that provision dealt only with employees working off hours. The contract contained a grievance procedure culminating in arbitration that was applicable to "Any complaint arising among the employees in the shop over the interpretation of this Agreement relative to hours, wages, overtime, working conditions, discrimination, classifications or other terms of this Agreement. . . . " There appeared to be no contract provision dealing directly with the close of part of the operation. A serious argument could be made that the issue in question in that case related solely to a statutory right and not a contract right. However, a majority of the

Board held that the case should be deferred to arbitration, saying [228 NLRB at 830]:

> As to the dissenters' argument that there is no contract provision which could even arguably give color to Respondent's conduct, we disagree. The Supreme Court said in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 582-583, that an order to arbitrate a particular grievance should not be denied "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." We believe that the dispute here falls within that standard and is therefore properly referable to the parties' arbitration procedure.

The Board has held that Joint Committee decisions can be treated as arbitration awards. *Denver-Chicago Trucking Company, Inc.*, 132 NLRB 1416 (1961); *United Parcel Service, Inc.*, 232 NLRB 1114 (1977). The absence of a neutral member in a biparty panel equally divided between management and union representatives does not preclude a deferral. *Terminal Transport Company, Inc.*, 185 NLRB 6762 (1970).

The issue of whether Respondent violated the contract was considered by the grievance committee. The statutory issues involved in the instant case are raised only if there is a factual finding that Respondent violated the contract. As the Board held in *Roy Robinson*, 228 NLRB at 828:

> . . . [I]f the arbitrators should decide that the contract terms did give the Employer such right [to close part of its operation and

> discharge certain employees], then the Employer's conduct would also perforce have been lawful under the Act.

The grievance committee was fully competent to make that factual finding and the grievance committee found that the Union's claim that the contract had been violated did not have merit.

Counsel for the Charging Party contends in his brief that the "arbitration" was irregular for a number of reasons. I am unable to agree with the Charging Party's contentions. Much of the argument deals with the underlying supposition that there was a conflict of interest between the employees and the Union. The employees may not have been pleased with the manner in which Local 420 represented them, but the Union was their lawful representative and this case does not involve any 8(b)(1)(A) "unfair representation" issue. Livingston-Graham and Local 420 were parties to the contract and the employees were not. The key dispute was whether Livingston-Graham violated the contract by removing equipment and work from the bargaining unit. Local 420, as a party to that contract, was involved in the grievance presentation, and Local 420 makes no contention that the proceedings were unfair or irregular. Some of the members of the grievance committee did have an interest in the proceeding because the companies and the unions they came from had for-hire contracts. However, there is no contention that the grievance committee members were neutral. They were involved in the same industry as Livingston-Graham and were bound by the same contract. Decisions involving contract interpretation has an impact on all parties to the contract, including those parties who are sitting on the grievance committee. By

its very nature, a grievance committee of this kind cannot be completely disinterested. Yet, the Board has not required the traditional judicial disinterest from such parties in deferring to their decisions. The entire grievance procedure is part of the collective-bargaining process and the fact that the members of the committee are involved in that process does not disqualify them from resolving disputes of this nature. Nor is the integrity of the grievance committee's decision undermined by the fact that the proceedings were informal. The proceedings can be fair without the presence of professional arbitrators and attorneys and without a written or taped record. An extensive written decision is not required where it is clear that the grievance committee considered and decided the relevant issues. The grievance committee proceeding is in large measure an exercise in self-government under the contract. Where contract interpretation is involved, such self-determination by the party's representatives is to be encouraged and strict judicial rules should not be required.

The Charging Party's counsel argues in his brief that the employees did not agree to be bound by the grievance committee's decision. However, Local 420, as a party to the contract, did agree to be bound. Local 420 was the statutory representative of the employees and, therefore, the employees were bound through their representative. In addition, the employees through Kris Borum did participte in the presentation to the grievance committee.

In sum, I find that the proceedings of the grievance committee appear to have been fair and regular, all parties had agreed to be bound, and the decision of the grievance committee was not clearly repugnant to the

purposes and policies of the Act. The grievance committee found that Livingston-Graham had not violated the contract, and that finding should be honored by the Board. In the absence of a finding that Respondent did violate the contract, the complaint must be dismissed and I so recommend.

APPENDIX B

Memorandum Opinion of the Ninth Circuit Court of Appeals with Dissenting Memorandum, Cases No. 79-7380 and 79-7475 (1981)

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BROWN COMPANY; BROWN COMPANY, LIVINGSTON-GRAHAM DIVISION; BROWN COMPANY, TRI-CITY CONCRETE DIVISION; and L-T TRANSPORT, INC., *Petitioners,*	)	No. 79-7380 No. 79-7475 MEMORANDUM
vs.	)	
NATIONAL LABOR RELATIONS BOARD, *Respondent,*	)	
and	)	
KRIS A. BORUM, *Intervenor.*	)	

FILED
SEP 2 1981
RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

Petition to Review Order of NLRB
and NLRB's Petition to Enforce its Order
Argued and submitted January 7, 1981

Before: ANDERSON and SCHROEDER, Circuit Judges, and MURPHY,* District Judge.

Brown Company and its subsidiaries petition to review the decision and order of the National Labor Relations Board (the Board), and the Board cross-applies to enforce its order. The charges were filed by Kris A. Borum, an employee and intervenor therein, in May of 1976. The Board determined that Brown Company and its subsidiaries had unlawfully deprived certain of its employees of employment to which they were entitled, and thus violated sections 8 (a) (3) and (1) of the National Labor Relations Act (the Act), 29 U.S.C. § 158 (a) (3) and (1). *Brown Company*, 243 N.L.R.B. No. 100 (1979).

I. *FACTS*

In 1975, Brown Company was engaged in the manufacture and transportation of rocks, sand, gravel, and ready-mix cement. It operated through two divisions - Brown Company Livingston-Graham (Livingston-Graham) at Irwindale, California, and Brown Company Tri-City Division (Tri-City) at Redlands, California. Both divisions were covered under a contract between Rock Products and Ready-Mix Cement Concrete Employers of Southern California, and Locals 420, 692, 495, 88, 982, 235, and 871 of the Teamsters. Each division had a collective bargaining agreement with different Locals of the

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* The Honorable Thomas F. Murphy, United States District Judge, Southern District of New York, sitting by designation.

Teamsters Union. Livingston-Graham Division's was with Local 420, and Tri-City Division's was with Locals 467 and 871. Local 420's agreement was called the Blue Book, and the Locals 467 and 871 agreements, the Orange Book. All agreements, by their terms, expired on August 31, 1977.

Since Brown Company had to buy the cement it used in making concrete, it transported cement from the seller to its concrete plant in specially-designed trucks called cement trains, and received a credit from the seller equal to the cost of such delivery service. Cement hauling was regulated in California by the Public Utility Commission (PUC), which set a minimum rate to be charged for the hauling. Although not mandatory, it was the practice of the haulers to charge the rate set by the PUC. Livingston-Graham owned 7 cement trains and employed 12 cement drivers at its Redlands location.

The provenance of the present controversy was the evolution of an industry practice, known as "For Hire" contracts, which the ALJ explains in detail and which we will paraphrase.

Historically, there were two categories of employers who operated cement trains in the ready-mix concrete industry. In one, the companies used their own cement trains in hauling cement for their own needs. From these employers, the Teamsters Union would seek Blue Book or Orange Book contracts, depending on their geographic location. Before L-T Transport, Inc. (L-T) became a subsidiary of Brown and took over the Livingston-Graham-Tri-City operations, Livingston-Graham and Tri-City were employers in this category.

The second category were those whose *primary* business was the hauling of bulk cement for cement

companies on a "for hire" basis, *i.e.*, they rented their equipment and drivers to the cement companies. The Teamsters Union, within whose jurisdiction the "for hire" companies were located, entered into special "for hire" cement carriers agreements. The wage rate for such drivers was, and is, substantially less than the wage rate for drivers covered in the Blue and Orange Books.

Part of Livingston-Graham's, and Tri-City's work involved "for hire" arrangements with cement companies. Because Livingston-Graham and Tri-City operated under the terms of the Blue Book and Orange Book, they paid higher wages to their employees engaged in "for hire" work than did their competitors who operated under the "for hire" agreements.

Beginning in 1970, a practice in the industry developed in which companies who were signatories to the Blue and Orange Books began to create or acquire separate corporations and transfer their cement train operations to the new or acquired company which, in turn, would enter into a "for hire" agreement with the Teamsters Union under whose territorial jurisdiction it operated. The new company would perform the same work that the parent had previously done and would carry cement needed by the parent. Since the new subsidiary's sole business was operating cement trains, it would bill the cement company for its services on a cheaper "for hire" basis.

While the parent had previously received a credit from the cement company against the purchase of cement, the new company would simply bill the cement company for service. Thus, the parent could have its own cement needs filled at a lower cost because the new company would pay the lower rate to cement train

drivers. The ALJ then explained, in detailed findings, how most of the companies, over a period of years, had formed new subsidiaries and which, in turn, made "for hire" contracts with the Teamsters at lower driver rates. The ALJ, in addition, accepted the testimony of a knowledgeable witness familiar with this evolution, that there are only 3 ready-mix companies in the California area still operating cement trains under the Blue or Orange Books, and that those 3 companies operated only a combined total of 6 or 7 cement trains and hauled 2% or less of the total cement hauled in that area.

Dyck, an officer of Livingston-Graham, early in 1975 learned that its *chief competitor*, Con Roc, had formed a separate hauling company called Reliance, and had entered into a "for hire" agreement with Teamster Locals 420, 467 and 871. On April 17th, Dyck told Traweek, the Secretary-Treasurer of Local 420, that he intended to set up a hauling company and inquired if 420 would agree to the same terms that it had agreed with Con Roc. On June 27th, Dyck told Traweek that the new hauling corporation, called L-T Transport, was "now set up," and asked that Local 420 provide him with a cement haulers agreement such as one recently executed with "our competitor." On July 15th, Dyck, who also represented Tri-City, had a conversation with Traweek and Mann, the business representative of Local 467, which represented Tri-City's 4 cement drivers, and told them that if the two Locals would agree to the same "for hire" agreement with L-T as they had with Reliance, he would leave the cement trains where they were in the Livingston-Graham and Tri-City yards and give the drivers the choice of either transferring to L-T without loss of seniority, or to use their seniority to "bump" into other

jobs, and thus the operation would remain the same except the drivers would be paid less. Traweek asked if he would "red-circle" the wage rate of the current drivers, which means retain their current wage rates even though newly-hired drivers would receive the lower rate, and Dyck replied that he would go nonunion before he would "red-circle."

A meeting was arranged with the drivers for July 24—on that date Dyck, Traweek, and Thompson, President to Local 420, met with 11 of the 12 Livingston-Graham drivers.

Dyck, under the mistaken impression that Traweek had orally agreed to the "for hire" contract, told the drivers that Livingston-Graham was going out of the cement hauling business and would no longer employ drivers, and handed out copies of the "for hire" agreement and annexed thereto were two blank sheets of paper to sign, choosing either to transfer to L-T of stay with Livingston-Graham. Traweek, who understood that there was a choice of transferring to L-T with seniority if Local 420 agreed to the "for hire" contract, told the drivers that it was in their interest if the "for hire" contract was signed, otherwise the cement trains would be moved out of the Union's jurisdiction and they would lose their jobs or have to bump into other jobs at Livingston-Graham. (Some drivers knew that they hadn't sufficient seniority.) Thompson also told the drivers that they should sign the agreement and "it would be keeping jobs in Local 420 instead of outside." Traweek assured the drivers that he would not sign unless the drivers authorized him to do so. It was decided that another meeting would be necessary. A similar meeting was held for the Tri-City drivers on

July 30, and they authorized their bargaining representative, Local 467, to sign the "for hire" agreement.

The next meeting with the Livingston-Graham drivers was on July 31, when Dyck answered questions from drivers regarding their seniority and pension rights under the proposed contract, and Thompson also told them that it would be better for them to sign because the trains would be moved if they didn't, and the drivers were again asked to sign one of two papers indicating their choice to transfer to L-T or remain at Livingston-Graham. They were told they had until August 11th to make up their minds.

Sometime after the July 31 meeting, Traweek held another meeting with the Livingston-Graham train drivers. A vote was taken to decide if they should sign the "for hire" agreement. The employees decided not to sign the "for hire" agreement.

Before L-T began its operation on January 2, 1976, Livingston-Graham had 7 cement trains and 12 cement train drivers. When the cement trains were transferred to L-T on January 2, 1976, Borum and 2 others who did not have enough seniority to bump were laid off that day. The other 9 bumped into other jobs with Livingston-Graham. Some of the jobs had less overtime than they had been used to, and other jobs were considered less desirable. Four months later, the 3 laid off were reemployed, but not as cement drivers.

The Grievances

Grievances were filed under the Blue Book grievance procedures over the transfer of cement hauling work to L-T. The grievance of Borum was taken to the second step of the grievance procedure. The procedure provided for a committee made up of an equal number of management and union representa-

tives to hear the grievance. If the committee reached a decision, it would be final and binding. If a decision could not be reached, the third step provided for the appointment of an arbitrator.

The committee selected consisted of three management and three union representatives. Traweek, as chairman, presided, and, although he did not have a vote in resolving the grievance, he had selected all three of the union representatives. At the hearing, Traweek denied Borum's request to have her attorney appear on her behalf, and ejected Borum's lawyer from the room. The Rules permitted only authorized union and company representatives to present cases. When 420's representative began to present the grievance, Borum interrupted, claiming that 420 had not been fairly representing her. She asked permission to present her own case, and the request was granted. Her claim was that Livingston-Graham had violated the Blue Book by failing to negotiate with Local 420 over the transfer of the trucks, and also had violated the wage provision by paying lower wages to the new drivers after the transfer, and violated the job protection provision by transferring the work of the bargaining unit to a related company. Dyck, who represented Livingston-Graham, argued that it could not effectively compete if it continued to pay Blue Book wages, and that this was the reason it sold the trucks to L-T Transport after failing to successfully negotiate a new agreement with 420. Dyck claimed the right, under the job protection clause, to sell these trucks to L-T.

The Grievance Committee met in executive session and denied the grievance. The full extent of their

decision was: "Moved and seconded, claim of Union be denied. Carried."

The Board, in disagreement with the ALJ, refused to defer to the award of the committee.

II. *DISCUSSION*

The general criteria established by the Board is that it will defer to an arbitration decision if "(1) the arbitration proceedings appear to have been fair and regular; (2) all parties agreed to be bound; and (3) the arbitrator's decision was not clearly repugnant to the purposes and policies of the National Labor Relations Act." *Ad Art, Inc. v. N.L.R.B.*, 645 F.2d 669, 675 (9th Cir. 1981).[1]

In regard to bipartite panels or joint committees made up of equal number of union and management representatives, the Board has held that the absence of an impartial public member on the joint committee will not invalidate an award by that committee where the general arbitration deferral criteria are satisfied. *Denver-Chicago Trucking Co.*, 132 N.L.R.B. 1416 (1961); *Roadway Express, Inc.*, 145 N.L.R.B. 513 (1963); *Youngstown Cartage Co.*, 146 N.L.R.B. 305 (1964); *Terminal Transport Co., Inc.*, 185 N.L.R.B. 672 (1970); *Automobile Transport, Inc.*, 223 N.L.R.B. 217 (1976); *United Parcel Service, Inc.*, 232 N.L.R.B. 1114 (1977). The assumption is that "each representative is customarily prepared to argue for or against the merits of the employee's grievance." *Roadway Express, Inc.*, 145 N.L.R.B. at 515. However, where the circumstances indicate that the entire arbitration panel may have been "arrayed in common interest against the individual grievant," the Board has refused to honor the decision of the panel. *See Roadway Express, Inc.; Youngstown Cartage Co.*

"Our review of the Board's decision is limited to determining if the Board abused its discretion. *Hawaiian Hauling Services, Ltd. v. NLRB*, 545 F.2d 674, 676 (9th Cir. 1976), *cert. denied*, 431 U.S. 965, 97 S.Ct. 2921, 53 L.Ed.2d 1061 (1977). The Board only abuses its wide discretion if it fails to follow its own deferral standards or if the standards themselves are invalid. *Id.* (citations omitted)." *Ad Art, Inc. v. NLRB*, at 675.

Here, the Board refused to defer to the award of the committee because (1) a majority of the members, including one union representative, appeared to have interests which were directly in conflict with those of the grievant; (2) there was little evidence to indicate that the committee considered the unfair labor practice issues; and (3) both prior to and during the grievance hearing, the position of the grievant and her representative, Local 420, were not in harmonious accord. We believe the first-stated reason justified the Board's refusal to defer to the committee's decision.

The Board ruled that it would no longer honor the award of a joint committee "where it appears that members of that committee have interests which are directly in conflict with those of the grieving party." *Brown Co., supra.* Although this rule sets forth a somewhat stricter requirement regarding the composition of joint committees, it is not inconsistent with the Board's prior decisions in *Roadway Express, Inc., Youngstown Cartage*, or *Mason and Dixon Lines, Inc.*, 127 N.L.R.B. 6 (1978). *See also NLRB v. ILWU & Local 27*, 514 F.2d 481 (9th Cir. 1975). The responsibility of establishing deferral criteria rests with the Board in the first instance, *NLRB v. Max Factor and Co.*, 640 F.2d 197, 201 (9th Cir. 1980), and "[t]he Board may change [or modify] its deference criteria without engaging in

conduct which a court would find to be an abuse of discretion." *Ad Art, Inc.*, at 675, n.2. We determine that there was no abuse of discretion by the Board in adopting these deferral standards.

Applying these standards, the Board found that:

> "In this case, one of the representatives on the committee was from Local 871, which represented some employees of Tri-City, but had no jurisdiction over cement train drivers. However, prior to the grievance hearing here, Local 871 had signed a for-hire contract with Respondent, and its members who worked for Tri-City had been invited to, and some did, transfer to L-T cement train drivers filling jobs formerly held by the grieving parties. Likewise, two of the management representatives on the committee were the retiring industrial relations management director of the employer association and his successor, people whose function it is to act in the best interest of the association's employer-members, including Respondent and other companies and signed for-hire contracts with local unions. The third member from management was Clemente, of Sully-Miller Contracting Company, which had also formed a for-hire cement company." (footnote omitted)

Brown Co., supra. The Board determined that the "situation necessarily created a community of interest on the part of the committee members which was in conflict with the interests of the grievants and which would preclude the impartiality we deem necessary in an arbitration proceeding." *Id.* We believe that the

Board did not abuse its discretion in declining to defer to the committee's decision.[2]

However, while we accept the Board's decision in refusing to defer, we cannot accept its determination on the merits.

The Board stated that the legality of the respondent's actions was not dependent upon an interpretation of the contract, but rather must be judged in accordance with statutory law. Without attempting to interpret the terms of the collective bargaining agreement, the Board found that the transfer of the cement trains from Livingston-Graham to L-T was a removal of bargaining unit work and a contract modification which could only be implemented with the consent of the other party. Local 420 had agreed to sign the for-hire agreement and allow the transfer of the cement trains only if authorized by the employees concerned. The employees had not given their consent; thus the transfer of the cement trains was deemed a unilateral act by the Board. The Board found that respondent had taken its actions for the sole purpose of escaping its wage obligations under the existing collective bargaining contract. Since some of the drivers had been laid off and others were forced to bump into less desirable positions at Livingston-Graham, the Board determined that the respondent's actions were "inherently destructive of employee interests" and violations of Section 8(a) (1) and (3) of the Act.[3]

The basic flaw in the Board's analysis is its conclusion that the legality of the respondent's actions did not require an interpretation of the contract. To the contrary, we believe that the ALJ was correct in

viewing the threshold question as one involving contract interpretation.

The dispute in this case centers around Article XIX, Job Protection,[4] of the collective bargaining contract. The respondent contends that Article XIX deals directly with its right to make the type of transfer involved here. Moreover, respondents contend that the consideration of industry practice, past practice, the statements of the parties, and the law of the shop would establish that its actions did not violate the terms of the collective bargaining agreement.

The General Counsel apparently concedes that the collective bargaining agreement "might well be interpreted to permit the Company to transfer its equipment from one location to another for legitimate business reasons . . . " (brief at 22 n.11). However, the General Counsel argues that it is doubtful that the collective bargaining agreement would allow such a transfer in order to obtain lower wage scales.

Thus it is apparent that the initial determination must be whether the respondent was given the right under the terms of the collective bargaining agreement to transfer the cement train work from Livngston-Graham to L-T for the purpose of paying a lower wage scale to its cement train drivers.[5] We recognize that in certain situations, actions which are authorized by contract may nevertheless be unfair labor practices. *See NLRB v. Wilson Freight Co.*, 604 F.2d 712, 722 (1st Cir. 1979). However, in this case, we believe that if respondent's actions were permitted under the contract, then the respondent's actions would also have been lawful under the Act. *Cf. Roy Robinson, Inc.*, 228 N.L.R.B. 829 (1977) (if the employer was given the right to unilaterally close part of its operations, the

body shop, and discharge certain employees in order to lease the body shop, then that conduct would be lawful under the Act and, therefore, the Board deferred making a decision on the complaint and referred the dispute to arbitration in accordance with the contractual grievance procedures); *Los Angeles Marine Hardware Co. v. NLRB*, 602 F.2d 1302, 1306-1307 (9th Cir. 1979) (after rejecting the employer's contention that the contract applied only to a particular geographical area, the court enforced the Board's determination that the employer's termination of employee, and the relocation of its operations constituted a mid-term modification of the contract and a violation of Section 8(a) (1) and (3) of the Act).

We therefore remand this case to the Board for reconsideration. We leave it to the discretion of the Board to determine whether a remand to a newly-composed joint committee is warranted.

The petition for review is GRANTED in part; the cross-application for enforcement in DENIED, and the case is REMANDED for further proceedings.[6]
JUDGE MURPHY dissents and may file a separate statement at a later date.

FOOTNOTES

[1] More recently, the Board has further stated that it " 'will no longer honor the results of an arbitration proceeding under *Spielberg* unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator.' The party seeking deferral has the burden of proving that the statutory issues were before the arbitrator. *Suburban Motor Freight, Inc.*, 247 N.L.R.B. No.2, 102 L.R.R.M. 1113, 1114 (1980)." *Ad Art, Inc.*, at 676.

[2] The fact that the Union has decided to abide by the committee's decision and has not joined the employees in filing the unfair labor practice charges does not affect our decision. A union may adopt whatever position it chooses regarding an employer's actions or an arbitration decision. However, sections 7 and 9(a) of the National Labor Relations Act do not prohibit employees from filing unfair practice charges against their employer in an attempt to require the employer to fulfill its statutory duty to bargain with the union before instituting changes in the terms and conditions of employment. Alfred M. Lewis v. NLRB, 587 F.2d 403, 409 (9th Cir. 1978).

[3] As stated in *Los Angeles Marine Hardware Co. v. NLRB*, 602 F.2d 1302, 1307 (9th Cir. 1979):

> "A § 8(a) (3) violation requires normally that the Board make an affirmative showing that the employer's discriminatory conduct was motivated by an antiunion purpose. (citations omitted) When the employer's conduct is 'inherently destructive,' however, antiunion motivation is presumed to exist. (citations omitted)"

[4] Article XIX, which is entitled "Job Protection," provides as follows:

> "It is the intent of the parties to this Agreement to protect the work performed by employees in the bargaining unit.
>
> "The employer recognizes that it is important and desirable to utilize its own equipment and drivers to the greatest extent possible prior to using sub-haulers and/or non-Company trucks.
>
> "The Union recognizes that under certain conditions, such as those dictated by customer demands, equipment requirements, daily dispatch determinations, materials to be hauled and similar factors, that sub-haulers and/or non-Company trucks are necessary and have been so utilized throughout the Industry for many years.
>
> "The Employer, in accordance with the above, must, however, determine the number, type and location of its working equipment in conformity with its business requirements. The Employer further must be able to determine, in keeping with sound business practices, the extent to which it will replace equipment which is too costly to operate, obsolete or damaged.
>
> "Under these conditions, the Employer agrees that sub-haulers and/or non-Company trucks will not be utilized as a subterfuge to defeat the protection of the bargaining unit work.

> "In keeping with the above, the Union recognizes that the Employer will utilize such sub-haulers and/or non-Company trucks as required by location and classification only after all the available Company trucks at such locations and in similar classifications have been initially dispatched."

[5] Brown Company, Livingston-Graham, Tri-City and L-T were found to constitute a single employer within the meaning of the Act by the ALJ. That determination was upheld by the Board and has not been contested on review.

[6] We express no view on the impact, if any, of *First National Maintenance Corp. v. NLRB*, ___U.S.___ 49 LW 4769, upon the issues in this case. That determination should be made by the Board in the first instance upon remand.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BROWN COMPANY; BROWN COMPANY, LIVINGSTON-GRAHAM DIVISION; BROWN COMPANY, TRI-CITY CONCRETE DIVISION; and L-T TRANSPORT, INC., *Petitioners,*	)	No. 79-7380 No. 79-7475 MEMORANDUM
vs.	)	
NATIONAL LABOR RELATIONS BOARD, *Respondent,*	)	
and	)	
KRIS A. BORUM, *Intervenor.*	)	

FILED
SEP 28 1981
CLERK, U.S. COURT OF APPEALS

MURPHY, D.J.

I respectfully dissent, and would grant the petition for review; deny the application for enforcement; and affirm the decision of the Administrative Law Judge, Richard D. Taplitz, on the reasoned and lawyer-like

dissenting opinion of Board members Pennelli and Murphy.

The Board's three-to-two decision and order reversing the thorough and comprehensive decision of the ALJ justifies its action by concluding that it "appears the members of the Committee have interests which were directly in conflict with those of the grieving party . . . and which would preclude the impartiality we deem necessary in an arbitration proceeding. Under such circumstances we will not honor the award of that committee in deciding the unfair labor practice allegations before us."

Such conclusion, we submit, is without basis in fact or in law. And the Board made no such argument before the ALJ during trial or in its brief after trial. It has no basis in fact because there was no arbitration proceeding. The Committee referred to was a *Grievance* Committee composed of three members from management and three from the employees' Union, in strict conformity with Article XI of the Collective Bargaining Agreement.

It has no basis in law because there was no testimony or evidence in the seven days of trial before the ALJ that any member of the Grievance Committee, Union or management, had any interests that were in conflict with the grieving party. Not only was there no evidence (substantial or otherwise), but only one of the six Committee members was called as a witness, and not by the Board or the charging party but by petitioner companies. He was John Clemente, the Industrial Relations Manager of Sully Miller Contracting Co., a member of the Grievance Committee under the Collective Bargaining Agreement since January 1,

1975 and the man who signed the Collective Bargaining Agreement on behalf of management.

Clemente was cross-examined by counsel for the Board and the *then* intervenor Union, Local 420, and the charging party, and again on the last days of the trial by the charging party. The charging party, with the ALJ's permission, called and examined him again as her witness with leading questions under Rule 611(c), Fed. R. Evid., much of which incorporated the unsworn testimony of counsel. After many hours and some bitter and dogged questioning, not one answer even tended to prove any animus or conflict of interest. The most on such score was his name and his position with his employer.

The Board's finding of conflict of interest based only on the name and employment status, reminds us of a similar argument by Humpty Dumpty, as it did Chief Justice Burger, in the much publicized "snail darter" case, *TVA v. Hill*, 437 U.S. 153 n.18 (1978):

> "When 'I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean - neither more nor less.' " *Through the Looking Glass*, in The Complete Works of Lewis Carroll 196 (1939).[1]

Part of the problem, in our view, is that although arbitration *qua* arbitration is quite similar to a Grievance Committee hearing in *theory*, they are not similar in fact. Arbitration is, in its final analysis, a substitute for a court of law with its symbolic figure of blind Justice. The word "arbitrate," from the Latin

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[1] Mr. Justice Frankfurter quoted the same author for the same reason in *Shapiro v. United States*, 335 U.S. 1, 43 N.5 (1968).

arbitratus, means to make a *decision* or to be of *opinion*. "Arbitration," according to Webster's Third International Dictionary (1971), means "the act of arbitrating; *esp*: the hearing and determination of a case between parties in controversy by a person or persons chosen by the parties or appointed under statutory authority instead of by a judicial tribunal provided by law."

It follows, we submit, that an arbitrator or an arbitration, taking on the function of a court of law and making a decision, must be, like Caesar's wife, above suspicion. And we would agree that any award of an arbitrator or any arbitration should have such sanctity as the Board has paraphrased from its *Spielberg* decision, which related to an arbitration and not a Grievance Committee hearing. A Grievance Committee award or decision in a labor controversy is a horse of a different color. Mr. Justice Douglas explained this bargaining process, authorized by § 203(d)[2] of the Act, as follows:

> "Under the second step of that procedure, three representatives of the employers' negotiating committee and three representatives of the Union attempt to resolve grievances. *There is no neutral party*. If the Employer's representatives and the Union's representatives cannot agree on the resolution of a particular grievance, that grievance goes to the third step, under which an arbitrator makes the decision. If the representatives of the Employers and the Unions come to an agreement, that agreement is binding . . . a binding decision by the grievance committee

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[2] 20 U.S.C. § 173(d).

> can be treated by the Board as an arbitral determination of the dispute. *However, the grievance committee has other aspects as well. Under the contract, the parties are represented by their respective grievance committee members. All grievance proceedings are extensions of the collective-bargaining procedure. However, in situations such as this, the representatives of the parties on the grievance committee very literally continue the bargaining process.*" (emphasis ours). *United Steel Workers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 578-80 (1960).

Our duty under the Administrative Procedure Act[3] in these labor cases has been paraphrased as follows:

> "Whether on the record as a whole there is substantial evidence to support the agency's findings is a question *which Congress has placed in the keeping of the courts of appeal.* This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 491 (1951). (emphasis ours)

If our reading and understanding of the entire transcript of the testimony before the ALJ is correct, there was no evidence of any fact or any inference from a fact that would so much as lessen or dilute the unanimous agreement of the Committee to dismiss the grievance, then it must follow that the substantial

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[3] 5 U.S.C. § 1001 *et seq.*

evidence rule of *Universal Camera Corp., supra*, must be applied, and the Board's decision reversed.

In fn 3 the Board states:

> "Further, *although*, as noted by the Administrative Law Judge, *there is no 8(b) (1)A charge before us alleging that the Union did not fairly represent the grievants*, the evidence is *clear* that, prior to and during the grievance proceedings, the positions of the Union and the grievant, Borum, were not in harmonious accord. All of *these factors* weigh in our finding that deferral to the Committee award is not suitable in this case." (emphasis ours)

Borum was, as she said, "almost 5 feet" and weighed "about 115," and was one of the cement train drivers for Livingston-Graham even though she needed attachments to the foot pedals in order to reach them.

Although the Board found, in addition to its finding of conflict of interest, that there was a lack of harmonious accord between her and the Union, it neglected to state why, or the basis of its finding. The record on appeal gives the reason, and the shoe belongs on the other foot.

The record reveals that the Union was warned by Borum's attorney. Months before the Grievance Committee hearing the Union Business Agents tried to get the necessary information from Borum and the other grievants, but they wouldn't talk to them and thus were unable to obtain what the grievance really involved. The reason was that the charging party's counsel had written to the Union: "Hereafter you are not authorized to communicate directly with any of the above named clients [who were the various cement

train drivers, including Borum] in my absence or without my express prior consent."

At the hearing Borum did not wish Business Agent Tanberg to represent her, and at her request she was given permission to represent herself, which she did for about 30 minutes. It is fair to say that she argued, on her own behalf, quite well, and as Clemente, a member of the Committee testified, covered the Articles of the Collective Bargaining Agreement *seriatim* and to the point, but she offered no evidence at any time of any unfairness as far as the Union was concerned, nor any evidence of conflict by any of the six members of the Grievance Committee. Not even when she testified as a witness for the General Counsel and for her own attorney did she produce any evidence of bias or prejudice or impartiality.

The Board also spontaneously created in its footnote 3 a finding that it admits was not relevant to any charge before it, by finding, *as a factor which it weighed* in holding the deferral to the Grievance Committee's award was not suitable. Footnote 3 states, in part:

> "Further, *although*, as noted by the Administrative Law Judge, *there is no 8(b) (1)A charge before us alleging that the Union did not fairly represent the grievants*, the evidence is *clear* that, prior to and during the grievance proceedings, the positions of the Union and the grievant, Borum, *were not in harmonious accord*. All of *these factors* weigh in our finding that deferral to the Committee award is not suitable in this case." (emphasis ours)

Nowhere does the Board state what the basis of its finding is, or why "harmonious accord" between Union members and the Union tends to preserve the flow of

interstate commerce, or why, if it is a fact, the lack of it should rub off on the respondents. The only reference in the *record* to harmonious accord is Borum's "*ipsa dixit*" at the grievance hearing in February, 1976 that the Union did not fairly represent her and her desire to represent herself, and perhaps her lawyer's letter to the Union months before the grievance hearing.

To cap the unfairness of this *finding* by the Board and its *use* as a factor in not honoring the Grievance Committee award is the fact that the ALJ noted, in his footnote 13, that the Regional Director had dismissed two such charges against the Union. Also in that footnote, the ALJ found: "Nothing in this decision is intended to imply that Local 420 lacked 'complete good faith and honesty of purpose.' "

The Board's footnote 3 is a further source of perplexity wherein it states

> "that the evidence before us concerning the grievance proceedings is *scant* and *sheds little light* on what matters were considered by the Committee in its deliberations. *All that is shown* is that the Committee accepted Dyck's explanation of economic necessity and found that he [sic] did not violate Art. X and XIX of the contract. Yet, in considering art. XIX, which deals with job protection of employees and the right of the employer concerning subcontracting its hauling, there is little and vague evidence that the committee considered the single-employer nature of Respondent's operations as they relate to the transfer of work involved here." (emphasis ours)

These findings and comments do not, in our opinion, fairly reflect the testimony before the ALJ. To properly

focus the issue, we begin at the beginning with the Regional Director's complaint and the Board's counsel's opening statement.

The Regional Director's consolidated complaint, dated February 23, 1977, as explained by the Board's counsel to the ALJ at the opening of trial, was:

> "[w]e are alleging that the Respondent violated Section 8(a) (1) and (5) of the Act by placing the cement trains and signing a contract with Local 467 in reprisal for Local 420's refusal to accept their proposition - which would result in a — which resulted in a discriminatory reassignment of unit work during the term of a collective bargaining agreement covering that work, and which resulted in a partial abrogation of an in-force collective bargaining agreement and a *de facto* withdrawal of recognition from 420.
>
> In addition, we are also alleging that there is 8(a) (3) violation with regard to the drivers who were either laid off or were forced to bump to other positions, other classifications."

The case of the General Counsel and the charging party before the ALJ in the fall of 1977 was based on the testimony of seven witnesses — Dyck, the Vice President of Livingston-Graham, of L-T Transportation, Inc. and Assistant Secretary of Brown Company and in charge of personnel and industrial relations for all of the Brown companies, and four Local 420 cement train drivers — Grangreco, Wilson, Shaffer and Borum, plus Maslik, who was the Union shop steward, and Traweek, Secretary-Treasurer of Local 420. The charging party called Borum and one other cement

train driver, Thomas, and Daub, Secretary-Treasurer of Local 467, and Mann, Business Representative of Local 467.

The then intervenor Union, Local 420, called no witnesses. Respondent, in turn, called four witnesses — Battle, Industrial Relations Manager of Con Rock, a competitor of Brown, Clemente, Industrial Relations Manager of Sully Miller Contracting Co., also a competitor of Brown, Dyck, and Gibson, Vice President and General Manager of G&E Ready Mix, also a competitor of Brown.

The stenographic transcript of the testimony of these ten witnesses covers some 1000 pages and appears in Vol.II of the Record on Appeal. In the transcript there is not one word of testimony that relates to any of the Grievance Committee members or Union members that reveals, directly or indirectly, any conflict of interest with the grieving party. *This must be the reason the Board made no such claims before the ALJ.*

John Clemente, a member of a Grievance Committee which heard Borum's first grievance in August, 1975 and of the Committee which heard, in February, 1976, her second grievance (the one involved in this appeal), testified at length on the very subjects the Board found the evidence to be "scant and sheds very little light." His three days, recorded in 144 pages of stenographic transcript, reveals a substantial insight into the Grievance Committees' procedures, participants, arguments, deliberations and findings, none of which was contradicted. In sum, it reveals what Mr. Justice Douglas described in *Steelworkers, supra,* as "the grievance committee very literally continue[s] the bargaining process."

Clemente explained how members of the Committee were appointed, how they didn't know in advance what grievance they would hear, who the members were, who represented whom, and when, and what the various exhibits were and what they meant. He also explained how he was able to refresh his memory as to the details, how long the hearing took, who spoke what they said and argued, and the details of Borum's presentation of her own case and the manner of her presentation, and what the Committee considered in its deliberations and its decision.

With specific reference to Borum, who claimed her Union unfairly represented her without explaining how or why, she asked and received permission to present her case. Clemente testified that to the best of his recollection Tanberg and Davis, the Business Agents of Local 420, represented the Union, and Tanberg started to read the employees' grievance as distinguished from the Union's grievance. He then explained that the grievance exhibits before the Committee were filed by the Union based on what the grievant told the Business Agent, and a copy of it was sent to the employer, and Tanberg was using his own write-up made while talking with the grievants.

Tanberg was stopped almost immediately by Borum stating that she had not been fairly represented by Tanberg and Davis and wished to present her own case, and after some discussion between the chairman of the Union and Borum, it was decided that she could present her own case. Clemente then recalled that Borum, with a copy of the Blue Book (the Collective Bargaining Agreement) in her hand, proceeded to go through the articles that she claimed Livingston-Graham had violated. He testified that she went

through article by article, commencing with Article I, Section I, which related to the Union recognition clause, claiming that the Company had violated it when it failed to negotiate over the movement of the trucks. Then she went to Article I, Section IV, the wage section, claiming the Company did not pay the rate of pay for the type of equipment when they moved the trains but a lower rate. Then she went to Article XIX, the job protection article, that the Company sold the equipment to L-G Transport in violation of the job protection provision, and that it was no more than a *paper transaction* and a *paper transfer* of equipment and that the two companies were related, in violation of the bargaining unit she belonged to. She also mentioned other articles that were violated, and Article XX, the term of the agreement, because she was currently working under an agreement that had a term yet to be completed.

Clemente recalled that Dyck, representing the Company, argued that the Company couldn't compete under the current set-up, so they sold them to L-T Transport and L-T negotiated an agreement in good faith with another Local after attempting to negotiate with Local 420. Dyck also claimed, Clemente testified, that the Company had the right, under the job protection clause, to do just that, to sell the equipment. After the arguments were completed the Committee met in executive session and considered the arguments presented and ruled on the grievance. Exhibit 2(D) reflects the ruling of the Committee. He was not certain if a secret ballot was taken or not. He said that the decision of the Committee was announced by the chairman, Traweek. Clemente then described in some detail the arguments of Borum and the Company in

Case No. 2614, the case involving the bumping of the cement train drivers into another category.

Clemente also testified that he had attended Grievance Committee hearings about once every month for a period from January, 1975 to October, 1977, and that Tanberg and Davis were the Business Agents for Local 420 and represented the Local that the Grievance Committee heard, and identified the memorandum (Exhibit 2(F)) which he had prepared at the time of the February, 1976 hearing and circulated to the members of his Association, which enabled him to refresh his memory. When examined by counsel for the Board, he explained that the Committee chairman participated only to the extent of making sure that the Rules are followed but never in the deliberations — but do ask questions during the hearing. He also explained that the Grievance Committee is not a standing committee but consists of a number of employers and Union representatives who are eligible to sit on a panel, and each panel is picked for each monthly meeting by the two co-chairmen, the Union co-chairman picking the Union members and the management co-chairman picking the management members. He also explained that the members are not advised in advance which panel they are going to sit on, but asked only if they are going to be present, this for the purpose of determining whether they will have enough panel members present to conduct the Grievance Committee hearing.

Counsel for General Counsel had him explain Article XI of the Collective Bargaining Agreement, namely, the grievance procedures, and also the various exhibits, namely, that Exhibit 1(C) was the Union's allegations of violation of the Agreement as one of the papers the Committee received, explaining it was not

the original grievance that the employee makes to the Union but the Union grievance as a party to the Bargaining Agreement. It is the practice usually for the Union representative to present the grievance and explain it.

He identified the other members of the Committee by name and occupation that heard the grievance in February, 1976.

When the Board's counsel suggested that the Company's position at the hearing was that they wanted to operate under a less burdensome contract than provided in the Collective Bargaining Agreement, Clemente did not agree and said that the thrust of the Company's position was that they could not economically operate the trucks. Clemente could not independently recall exactly what the vote was although he kept notes, and his notes indicated that on Case No. 2613 (this appeal), on the bottom he had written: "Motion seconded, carried, unanimous."

Clemente was then cross-examined on many subjects and he denied that there was any discussion in the Committee's deliberations about Muser and his Local and the possibility of the men from the Local losing their jobs with L-T if the grievance was allowed. He also recalled, on cross-examination, that the Committee did identify themselves at the request of Borum despite the insinuations, and that they did consider the single employment issue because of Borum's arguments that the transfer of the trains was only a paper transaction.[4] Finally, he reiterated that the vote was 6-

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[4] As the majority notes in its footnote 5, the ALJ found the Brown companies constituted a single employer, with which the Board agreed, and that issue is not contested here.

to-0 in the February, 1976 Grievance Committee hearing, relying on his personel notes, which were produced and introduced in evidence.

He was also questioned and agreed that in February, 1976, Muser was connected with Local 871 and had signed a for hire agreement with L-G, although the testimony was stricken.

He was further questioned concerning the record of the February grievance hearing, and stated that it was recorded, but had no knowledge where the tape was, and denied that it had been removed to be erased or destroyed purposely. The executive session was not recorded, and it was not customary to do so. He couldn't recall the details of the voting other than it was against the grievance.

The majority refers, in footnote 6, to the recent Supreme Court case, *First National Maintenance Corp. v. National Labor Relations Board*, slip No. 80-544, decided June 22, 1981, but expresses no view of its impact, if any, upon the issues in this case. With deference, we disagree.

In the case now before us, the respondent's defense of its decision to move its cement trains and enter into a Union contract for hire was "an economically motivated decision" based on uncontradicted proof that more than 98% of the industry in which it was competing did the same thing. In addition, the Grievance Committee decided it had the right, under Article XIX "Job Protection," of its Collective Bargaining Agreement, to do what it did.

We submit that *First National Maintenance, supra*, has a very significent impact on this case and compels reversal of the Board.

Eight Justices have agreed in *First National* as follows:

> "We conclude that the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision, and we hold that the decision itself is *not* part of § 8(d)'s 'terms and conditions' over which Congress has mandated bargaining." p. 20. (footnote omitted).

APPENDIX C

NLRB's Supplemental Decision and Order Following Remand, 278 NLRB No. 113 (1986)

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

BROWN COMPANY; BROWN COMPANY, LIVINGSTON-GRAHAM DIVISION; BROWN COMPANY, TRI-CITY CONCRETE DIVISION; and L-T TRANSPORT, INC.,	)	No. 79-7380 No. 79-7475
Petitioners,	)	MEMORANDUM
vs.	)	
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent,	)	
and	)	
KRIS A. BORUM, *Intervenor.*	)	

SUPPLEMENTAL DECISION AND ORDER

On 30 July 1979 the National Labor Relations Board issued its Decision and Order[1] in this proceeding. The Board held that the Respondent[2] violated Section 8(a)(3) and (1) of the Act by transferring cement hauling work from its Livingston-Graham Division to its wholly owned subsidiary, L-T Transport, Inc., in order to escape its wage obligations under the existing bargaining agreement between Livingston-Graham and Building Material & Dump Truck Drivers Local 420, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of Ameria, Intervenor in this proceeding. The Board declined to adopt Administrative Law Judge Richard D. Taplitz' dismissal of the complaint. His action was based on his deferral to the ruling of a joint labor-management grievance committee. The Board found that the members of the joint committee had interests directly in conflict with those of the grievant and refused to defer.[3]

The Respondent petitioned the United States Court of Appeals for the Ninth Circuit to review the Board's Decision and Order, and the Board cross-applied to enforce its Order. On 2 September 1981 the court issued its decision,[4] granting in part the Respondent's

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[1] 243 NLRB 769 (1979), Members Penello and Murphy dissenting.

[2] The Respondent in this action is a single employer which consists of Brown Company; Brown Company, Livingston-Graham Division; Brown Company, Tri-City Concrete Division; and L-T Transport, Inc.

[3] 243 NLRB at 770.

[4] Unpublished opinion, Judge Murphy dissenting.

petition for review, denying the Board's cross-application for enforcement, and remanding the case to the Board for further proceedings in light of the decision. The court held that the Board did not abuse its discretion when it refused to defer to the joint labor-management grievance committee's ruling. However, the court stated that the Board erred by judging the Respondent's actions on the basis of statutory mandates, rather than examining the collective-bargaining agreement between Livingston-Graham and the Union to see whether that agreement allowed the transfer of work at issue. The court was of the opinion that article XIX of the contract arguably allowed the work transfer and that, if it did, the Respondent had not violated the Act. The court remanded the case to the Board for reconsideration, leaving to the Board's discretion whether a further remand to a newly composed joint labor-management grievance committee would be appropriate.[5] The court also noted that it left to the Board the question of what impact, if any, the Supreme Court's recent opinion in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), had on the case.

Accepting the Ninth Circuit's opinion as the law of this case, we affirm our prior decision not to defer to the decision of the joint committee and we now consider the question whether article XIX[6] of the

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[5] We note that none of the parties seeks a remand to a new joint labor-management grievance committee.

[6] Art. XIX provided that:

> It is the intent of the parties to this Agreement to protect the work performed by employees in the bargaining unit. The Employer recognizes that it is important and desirable to utilize its own equipment and drivers to the

contract privileged the transfer of work outside the bargaining unit.

Since the Ninth Circuit's remand the Board decided *Milwaukee Spring Division*, 268 NLRB 601 (1984) (*Milwaukee Spring II*), and *Otis Elevator*, 269 NLRB 891 (1984). The analysis in *Milwaukee Spring II* is premised on the well-established proposition that an employer may not make unilateral changes in mandatory subjects of bargaining prior to a good-faith impasse in bargaining. We also noted that Section 8(d) adds the further requirement that, when there is a contract in effect, the employer may not make changes

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greatest extent possible prior to using sub-haulers and/or non-Company trucks.

The Union recognizes that under certain conditions, such as those dictated by customer demands, equipment requirements, daily dispatch determinations, materials to be hauled and similar factors, that sub-haulers and/or non-Company trucks are necessary and have been so utilized throughout the Industry for many years.

The Employer, in accordance with the above, must however, determine the number, type and location of its working equipment in conformity with its business requirements. The Employer further must be able to determine, in keeping with sound business practices, the extent to which it will replace equipment which is too costly to operate, obsolete or damaged.

Under these conditions, the Employer agrees that sub-haulers and/or non-Company trucks will not be utilized as a subterfuge to defeat the protection of the bargaining unit work.

In keeping with the above, the Union recognizes that the Employer will utilize such sub-hauler and/or non-Company trucks as required by location and classification only after all the available Company trucks at such locations and in similar classifications have been initially dispatched.

in the mandatory terms and conditions in the contract without the consent of the union.

In that case, we found that the contract did not contain any prohibition to the transfer of work and therefore the employer did not violate Section 8(a)(5) when it relocated work after bargaining to impasse.

In the instant case, article XIX begins with the statement that: "It is the intent of the parties to protect the work performed by employees in the bargaining unit." To that end, Livingston-Graham promised to use its own equipment and drivers to the greatest extent possible, and not to utilize noncompany trucks as a subterfuge to defeat the protection of bargaining unit work. The Union, in turn, recognized that customer demands, equipment requirements, daily dispatch determinations, materials to be handled, and similar factors might require the use of noncompany trucks, but it is clear that the parties contemplated resort to noncompany trucks only in those situations where company truck resources had been exhausted. Livingston-Graham also retained the power to decide where and in what numbers the company trucks would be assigned, and the power to replace trucks which had become too old, too expensive, or too damaged to operate. Neither of these retained powers authorized Livingston-Graham to eliminate an entire job classification and transfer all cement hauling work out of the bargaining unit.

The Respondent nevertheless argues that industry practice and past practice sanction its transfer of the cement hauling equipment. Past practice could affect our interpretation of the collective-bargaining agreement in two possible ways. First, assuming arguendo that article XIX is ambiguous, past practice could shed

light on the actual meaning of an unclear provision. Second, if we find that article XIX, on its face, did not allow the Respondent's transfer of the cement hauling work, the Respondent could argue that the Union and its members, by their past acquiescence in the face of similar transfers, have lost their rights to complain in this instance. This second theory is based on a waiver — or estoppel — type argument.

The Respondent's evidence of past practice is insufficient to sustain either of these theories. There is some evidence in the record that, in the past, Livingston-Graham had transferred single pieces of equipment outside the geographical jurisdiction of Teamsters Local 420. However, as the Charging Party points out, the record is bare of an example of a previous transfer of an entire category of equipment. Thus, the Respondent cannot point to any evidence of an accepted practice that would support its argument that the contract allowed its transfer of the cement hauling work. Similarly, since there is no evidence that the Respondent ever previously accomplished a work transfer like the one at issue here, the Respondent cannot successfully argue that past acquiescence by the Union or its members estops them from protesting this work movement.

As for industry practice, there is considerable evidence in the record that other companies covered by the Blue Book agreement had set up cement hauling subsidiaries which then had signed "For Hire" agreements with the Teamsters local representing their cement train drivers. However, there is no evidence that any one of these companies had unilaterally transferred its cement hauling work to the subsidiary in midterm of the contract, without the consent of the

union involved. Perhaps more importantly, it is difficult for us to understand how, under the circumstances of this case, one union's failure to assert its rights under a contract with one employer would estop the members of another union from asserting rights under an identical contract with a different employer.

Neither the industry practice nor the past practice pointed to by the Respondent convinces us that article XIX permitted the Respondent to transfer the cement hauling work. Rather, we hold that the Respondent violated its job protection promises by moving the work from Livingston-Graham to L-T Transport. See *A-1 Fire Protection*, 273 NLRB No. 124 (Dec. 14, 1984).

Thus the transfer of Livingston-Graham's cement hauling work to L-T Transport was a unilateral midterm modification of the collective-bargaining agreement between Livingston-Graham and Teamsters Local 420. However, an inquiry into whether the Respondent violated the Act by this action does not end with this finding, for only a unilateral midterm modification of a *mandatory* subject of collective bargaining violates the Act. *Allied Chemical & Alkali Workers Local 1 v. Pittsburgh Glass Co.*, 404 U.S. 157 (1971). Therefore, we must determine whether the transfer of the cement hauling work was a mandatory subject. We hold that it was.

In *Otis Elevator* (269 NLRB at 892) we held that

> . . . the critical factor to a determination whether the decision is subject to mandatory bargaining is the essence of the decision itself, i.e., whether it turns upon a change in the nature or direction of the business, or turns upon labor costs. . . .

As found in our first decision, the Respondent transferred the cement trains out of the unit "for the sole purpose of escaping from its wage obligations under the existing collective-bargaining contract." 243 NLRB at 771. Therefore this was a mandatory subject of bargaining and the Respondent could not transfer the cement trains without the consent of the Union.[7]

As to whether the Union consented, the record is clear that the Union representative told the Respondent that it would agree to the transfer of work only if the employees agreed. The employees did not agree and the Union never consented to a modification of the contract. It is true that the Union did not appeal the decision of the grievance committee to the next step in the grievance procedure.

From this it is arguable that, by participating in the grievance procedure and acquiescing in the decision of the joint committee, the Union, in effect, consented to midtern modifications herein. See 243 NLRB 769, 775 (then Members Penello and Murphy dissenting). However, the Union's failure to press the grievance does not end the statutory issues here. For as the Ninth Circuit held:

> The fact that the Union has decided to abide by the committee's decision and has not joined the employees in filing the unfair labor practice charges does not affect our decision. A union may adopt whatever position it chooses regarding an employer's actions or an

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[7] Member Babson agrees with this conclusion as consistent with the Supreme Court's opinion in *First National Maintenance Corp.*, and with any of the views expressed in the Board's decision in *Otis Elevator*.

> arbitration decision. However, sections 7 and 9(a) of the National Labor Relations Act do not prohibit employees from filing unfair labor practice charges against their employer in an attempt to require the employer to fulfill its statutory duty to bargain with the union before instituting changes in the terms and conditions of employment. *Alfred M. Lewis v. NLRB*, 587 F.2d 403, 409 (9th Cir. 1978).[8]

In addition, to the extent this argument construes the grievance-arbitration procedure as a continuation of the bargaining process, it is settled Board policy that bargaining history will establish a waiver of the right to bargain on a mandatory subject only if:

> [I]t can be said from an evaluation of the prior negotiations that the matter was "fully discussed" or "consciously explored" and that the Union "consciously yielded" or clearly and unmistakably waived its interest in the matter.

C & C Plywood, 148 NLRB 414, 416 (1964), affd. 385 U.S. 421 (1967); see *A-1 Fire Protection*, supra; *American Distributing Co. v. NLRB*, 715 F.2d 446 (9th Cir. 1983); *Park-Ohio Industries v. NLRB*, 702 F.2d 624 (6th Cir. 1983). In the instant case the record of that "bargaining" is virtually nonexistent and therefore it simply cannot be said that the Union relinquished its right to the benefits of its bargain in article XIX. Moreover, the Board has long held that during the

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[8] Member Babson accepts the court's opinion as the law of the case.

term of a contract a union is not required to bargain at all about midterm changes.

In summary, the Respondent has transferred work out of the bargaining unit in the face of a work protection clause. The transfer turned entirely on a desire to reduce labor costs and was therefore a mandatory subject of bargaining. In these circumstances the Respondent could not implement this transfer without the consent of the Union and the Union did not consent to this transfer. Accordingly, we hold that the Respondent violated Section 8(a)(5) when it unilaterally discontinued its cement hauling operations and transferred this work to L-T Transport.

In its prior decision the Board held that the Respondent's conduct was "inherently destructive of employee interests" (quoting from *Ruston & Mercier Woodworking Co.*, 203 NLRB 123 (1973)). And, relying on *Los Angeles Marine Hardware Co.*, 235 NLRB 720 (1978), the Respondent's conduct was found to be violative of Section 8(a)(3). We now find that since the Respondent violated Section 8(a)(5) the remedy we order here makes it unnecessary to pass on whether the Respondent's conduct was "inherently destructive." We will therefore modify the previous Conclusions of Law and Order to delete the finding of an 8(a)(3) violation.[9]

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[9] The Respondent requests that it not be held liable for backpay for the time period during which it relied on the joint labor-management grievance committee's decision. We deny this request.

Amended Conclusions of Law

Substitute the following for Conclusion of Law 5.

"5. By discontinuing its cement hauling operations at Livingston-Graham's locations in Vernon and El Monte, California, and selling and transferring its trucks to L-T Transport, Inc. at its Redlands, California location while the Blue Book collective-bargaining agreement was still in effect and doing so without the consent of Local 420, Respondent acted in derogation of its duties under Section 8(d) of the Act and thereby violated Section 8(a)(5) and (1) of the Act."

3. Substitute the attached notice for that originally issued by the Board.

Dated, Washington, D.C. 28 February 1986

_____

Donald L. Dotson, Chairman

_____

Marshall B. Babson, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

MEMBER DENNIS, concurring.

I accept the Ninth Circuit decision as the law of the case and consequently would not defer to the joint committee's decision. I also agree with the finding that article XIX of the parties' contract is a valid work-preservation clause prohibiting the transfer of the cement hauling work. Accordingly, I would find that the Respondent, by transferring the work during the term of the contract, modified a specific term contained in the contract without obtaining the Union's consent, and thus the midterm modification of the contract violated Sections 8(a)(5) and 8(d) of the Act.[1] See my dissent in *DeSoto, Inc.*, 278 NLRB No. 114 (Feb. 28, 1986).

Dated, Washington, D.C. 28 February 1986

Patricia Diaz Dennis Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX D

Ninth Circuit's Order in Cases No. 86-7579 and 86-7647, 833 F.2d 1015 (Nov. 6, 1987)

APPENDIX D

FOR PUBLICATION

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BROWN COMPANY; BROWN COMPANY, LIVINGSTON-GRAHAM DIVISION; BROWN COMPANY, TRI-CITY CONCRETE DIVISION; and L-T TRANSPORT, INC., *Petitioners,*	)	No. 79-7380 No. 79-7475 MEMORANDUM
vs.	)	
NATIONAL LABOR RELATIONS BOARD, *Respondent,*	)	
and	)	
KRIS A. BORUM, *Intervenor.*	)	

FILED
NOV 6 1987
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Before: KENNEDY and PREGERSON, Circuit Judges, and GEORGE, District Judge*

The Board's holding that Brown Company's transfer of its cement trains was violative of the collective bargaining agreement is affirmed. The Board's remedial order is affirmed. We trust that the Board in fashioning the remedy has considered its effect on the new collective bargaining agreement between Brown Company and Local 420. The case is remanded for compliance proceedings consistent with this order.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 10835 Santa Monica Boulevard, Los Angeles, California 90025; that on February 4, 1988, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

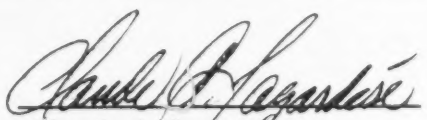
Clerk, United States
Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(Original + 40 Copies)

David B. Finkel, Esq.
1424 Fourth Street
Suite 238
Santa Monica, CA 90401

Mr. Elliott Moore
General Counsel
Nat'l Labor Relations Board
1717 Pennsylvania Ave., N.W.
Washington, D.C. 20570

Victoria Aguayo
Regional Director
Nat'l Labor Relations Board
Region 21
615 So. Flower St., 11th Floor
Los Angeles, CA 90017

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 4, 1988, at Los Angeles, California.



Claude A. Lagardere
(Original signed)

OFFICIAL SEAL
SALLY H. JONES
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires MAY 22, 19[illegible]